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THE METHODS OF BRITISH JUDICIAL INTERPRETATION OF HINDU LAW SOURCES.*

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I

It is well known that, ever since the advent of British rule in India, it has been established by a series of Acts of Parliament, Charters and Regulations that questions that come up before the Courts relating to succession, inheritance, adoption and marriage of Hindus, to caste and to Hindu religious usages and institutions should be decided according to the Hindu law and custom. This principle has been embodied in S. 112 of the Government of India Act of 1915 (this section has been omitted in the present Government of India Act, 1935), and in S. 16 of the Madras Civil Courts Act and in the corresponding sections of the Civil Courts Acts of other Provinces. The relevant portion of the earliest Act of Parliament of 1781 (21 George III, Chapter 70, Ss. 17 and 19) in regard to this matter is as follows:—

"That the said supreme Court shall have full power and authority to hear and determine all actions and suits against all and singular, the inhabitants of Calcutta, provided that the inheritance and succession to lands, rents and goods and all matters of contract and dealing between party and party, shall be determined in the case of Mahomedans by the laws and usages of Mahomedans and in the case of Gentoos by the laws and usages of Gentoos, and where only one of the party shall be a Mahomedan or Gentoo by the laws and usages of the defendant."

This Act also provides that:

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"In order that regard should be had to the civil and religious usages of the said natives the rights and authorities of fathers of families and masters of families accordingly as the same might have been exercised by the Gentoo or Mahomedan law were to be preserved to them within their families and any act done in consequence of the rules and law of caste respecting the members of the said families only was not to be held and adjudged a crime although it might not be held justifiable by the laws of England."

Thus, the principle underlying the early Charters and Regulations of the Acts of Parliament was to apply in the case of Hindus in matters of succession, inheritance, adoption, marriage, caste and religious usages and institutions their personal law in contra-distinction to territorial law. Their Lordships of the Judicial Committee in *Mussumat Fanny Barlow* v. *Sophia Eveline Orde*[1] observe in regard to the succession to the estate of Col. Skinner as follows:—

"At the time of the Colonel's death there was no *lex loci* of the Province in which he was domiciled, and the law applicable to the succession of any individual depended on his personal status which again mainly depended on his religion. Thus the succession of a Hindu would as a general rule. fall to be regulated by Hindu law, and of a Mahomedan by Mahomedan law and of an East Indian Christian by English law."

Again in *Helen Skinner* v. *Sophia Evelina Orde*[2] Lord Justice James delivering the judgment of the Board observes as follows:—

"In India however all or almost all the great religious communities of the world exist, side by side, under the impartial rule of the British Government. While Brahmin, Buddhist, Christian, Mahomedan, Parsi and Sikh are one nation enjoying equal political rights and having perfect equality before the Tribunals, they co-exist as separate and very distinct communities having distinct laws affecting every relation of life. The law of husband and wife, parent and child, the descent, devolution, and disposition of property are all different, depending, in each case, on the body to which the individual is deemed to belong; and the difference of religion pervades and governs all domestic usages and social relations."

This provision in the Act of 1781 was taken from Warren Hasting's plan for the administration of justice prepared and adopted in 1772 when the East India Company first stood forth as Dewan of the Province of Bengal and took upon themselves the entire management of their territories in India. The 23rd rule of that plan ran as follows:—

"In all suits regarding marriage, inheritance, caste and other religious usages and institutions the laws of the Quran with respect to Mahomedans, those of the Shastar with respect to Gentoos shall be invariably adhered to."

The rules also provided that Moulvis or Brahmins should respectively assist the court in expounding the law and in

1. (1870) 13 M.I.A. 277 at 307. 2. (1871) 14 M.I.A. 309.

passing the decree. This very language was later embodied in a Regulation passed on April 17, 1780, by the Bengal Government and in the revised Code of 1781 with the addition of the word "succession". By an Act of 1797, Charters were granted to the Mayors' Courts in Madras and Bombay reserving native laws and customs similar to those contained in the Act of 1781. As an instance, I shall also give the language of the early Charter in Bombay:

"In the case of Mahomedans or Gentoos, their inheritance and succession shall be determined in the case of the Mahomedans by the laws and usages of the Mahomedans and where the parties are Gentoos by the laws and usages of the Gentoos, or by such laws and usages as the same would have been determined if the suit had been brought and the action commenced in a native Court."

In a letter addressed to the Supreme Council of Bengal on March 19, 1788, Sir William Jones applauded the wisdom of this policy of the legislature. He said:

"Nothing could be more obviously just than to determine private contests according to those laws which the parties themselves had ever considered as the rules of their conduct and engagements in civil life. Nor could anything be wiser than by a legislative act to assure the Hindu and Mussalman subjects of Great Britain that the private laws which they severally held sacred and a violation of which they would have thought the most grievous oppression should not be superseded by a new system of which they could have no knowledge and which they must have considered as imposed on them by a spirit of rigour and intolerance."

The juristic principle upon which this policy of the legislature was based has been explained in an early case of the Supreme Court of Bombay in a celebrated judgment by Sir Erskine Perry, C.J., in *Hirbae* v. *Sonabae*[1] thus: "the main object was to retain to the whole people lately conquered their ancient usages and laws, on the principle of *uti possidetis*", "and the principle is that the parties are to be governed by that law which they as a matter of fact by their customs and usages have adopted, not the law which the Court by a consideration of the historical circumstances relating to the parties or their religious books or otherwise should consider to be the law they ought to have adopted."

"The prevalence of a custom among the governed may determine the sovereign or some political superior in subjection to the sovereign to transmute the custom into positive law, and the policy leading to such enactments as the Charters of the High Court or the Civil Courts Acts proceeded upon the broad easily recognisable basis of allowing the newly conquered people to retain their domestic usages."

1. (1847) 2 Morley's Digest 431 (443): Perry's Oriental Cases, p, 110.

Further, in *Freeman* v. *Fairlie*[1] the Judicial Committee explained the nature of the contending juristic principles involved in determining what law should be applied to the inhabitants of the Company's settlements in those times. One was that in the case of a newly discovered country settled by British subjects, they carry with them the English law as modified by the local circumstances. As regards conquered countries, the rule is different. The laws of the place in such cases remain in force untill changed by Royal or Parliamentary authority. These rules which were applied in western countries, it was believed, had to be modified so far as the settlement of the East India Company was concerned, as the acquired territory was not a newly discovered country, but well peopled and by a civilised race governed by long-established laws to which they were much attached and which it would have been highly inconvenient and dangerous to change. Moreover, those laws were so interwoven with and dependent on their religious institutions and a great part of them could not possibly be applied to the Government of a Christian people. Besides there was no uniform *lex loci* to regulate inheritance, succession and other important subjects. Hence the intermediate course was taken of applying the principle relating to a newly discovered country with regard to the British settlers and company's servants, and as regards the native inhabitants, the principle of applying their own laws.

The difficulty therefore early arose for the British Judges and Courts of finding out what the laws and usages of the Hindu inhabitants were and where to get them and how to deduce and establish the rules of law which may be adopted as British rules of decision in cases. So they had recourse to the assistance of men who were believed then to be learned in the aws and usages of the Hindu inhabitants and it was provided that the British Courts should seek the opinion of these Pandits as they were called and to generally act according to their opinions. The European judges set out the case and referred it to the opinion of the Pandits and enforced the rule of law in the particular cases before them in accordance with the opinions of the Pandits. Fortunately there were some European scholars also who studied the Sanskrit language and had access to the original treatises which the Pandits consulted

1. (1828) 1 M.I.A. 305.

in giving their opinions, eminent scholars like Sir William Jones, Mr. Colebrooke, Mr. Sutherland, Sir William Macnaughten, Mr. Ellis of the Madras Presidency, Dr. Burnell and Sir Thomas Strange. So, by the middle of the 19th century, the rules of Hindu law and usage came to be deduced by the methods of ascertaining them by reference to authoritative text books, judicial decisions and to the opinions of Pandits. In the year 1864, the system of obtaining opinions from Pandits was abolished and thereafter the British Courts had only to ascertain the law from what they believed to be the authoritative text-books and from the judicial decisions. Though on some occasions the opinion of the Pandits was suspected, and on the other occasions the judges were satisfied entirely with their reasoning, on the whole, as appears from the reported decisions of the highest tribunal, *viz.*, the Judicial Committee, the assistance of the Pandits was of great help to the European judges who were generally unacquainted with the language of the original treatises of the Hindu law.

From the foregoing account it will be clear that at the commencement of British rule and the consequent administration of justice by British Courts, two principles were adopted, (1) the principle which was well recognised under the Roman law, of allowing to foreigners the governance of their own personal laws, (2), the principle of religious toleration, the personal laws of the Hindus and Mahomedans being viewed by the British administrators as mixed up with their religion. We find that Warren Hastings states in his 23rd rule this personal law as the law of the Quran in the case of the Mahomedans and the Shastar in the case of Gentoos. This indicates he had in mind their predominantly religious character. A somewhat different kind of justification for preserving the personal law of the Hindus was indicated by Sir Thomas Strange. In his introduction to his 'Hindu Law' at p. 10 he puts the principle from the standpoint of Hindu jurisprudence as he conceived it:

"In preserving it so far as Britain had done to the millions who claim the benefit of it as their inheritance, she has conformed to the wisdom and experience and the dictates of humanity, considerations that appear to have had their influence with this very people themselves as referable to others from the earliest period of their legislation. Speaking of the king having effected a recent conquest, let him, says, Manu, establish the laws of the conquered nation as declared in their books (Manu, VII, 203)."

A similar rule is also enunciated by Yajnavalkya (Raja-Dharma, Verse 342). In the commentary of the Mitakshara

on this verse, a significant sentence is added as the reason for this rule, *viz.*, that confusion should not be created by the super-imposition of the usages of the conquering country. The reference to this rule of Manu by Sir Thomas Strange shows that the early European judges and administrators viewed the binding authority of this personal law as usages obtaining among the native inhabitants. For the two texts above referred to are only in connection with the rule to be observed in regard to local usages if they are not opposed to the Shastras, as the qualifying phrase used by the Mitakshara in commenting on the verse of Yajnavalkya clearly shows. Though Warren Hastings mentioned the Shastras as law in his 23rd rule and also the regulation of 1780 referred to the law of the Shastar with respect to Gentoos and the Quran with respect to Mahomedans, the Act of 1781 refers to, "the laws and usages of Gentoos".

On the question as to 'who are Hindus' to whom the Hindu law and usages are said to apply, the early enactments speak only of the Hindus and the Mahomedans, generally without defining them. But as we proceed in the history of judicial administration of the Hindu law the difficulty of defining the term 'Hindu' became more and more apparent. Does it refer to a race known as Hindus or to those who follow the religion known as the Hindu religion or to both? The further question also will be what is exactly understood by 'Hindu religion'. In the case already reported in 2 Morley's Digest of Indian cases, 431 at p. 442, Sir Erskine Perry, Chief Justice, in explaining the term "Gentoo" in the Bombay Charter, says as follows:—

"It was believed erroneously that the population of India might be classified under the two great heads of Muhammadan and Gentoo; and the use of the latter term as a *nomen generalissimum* which is unknown, by-the-bye, in any eastern tongue, or even in colloquial use, except in the Presidency of Madras, shews that the main object was to retain to the whole people lately conquered their ancient usages and laws, on the principle of *uti possidetis.*"

"It may be questioned whether any individual in the Legislature, with the exception, perhaps of Mr. Burke, was aware of the sectarian differences which distinguished Shia from Sunny; and not even that great man, we may be assured, was at all conscious that there were millions of inhabitants in India such as Sikhs, Jains, Parsis, Hebrews, and others, who had nothing or next to nothing, in common with Brahminical worship." In attempting to define the term 'Hindu' the High

Court of Calcutta in the case of *Bhagwan Koer* v. *Bose*[1] affirmed by the Privy Council observe at p. 15:

"We shall not attempt here to lay down a general definition of what is meant by the term 'Hindu'. To make it accurate and at the same time sufficiently comprehensive as well as distinctive is extremely difficult. The Hindu religion is marvellously catholic and elastic. Its theology is marked by eclecticism and tolerance and almost unlimited freedom of private worship. Its social code is much more stringent, but amongst its different castes and sections exhibits wide diversity of practice. No trait is more marked of Hindu society in general than its horror of using the meat of the cow. Yet the Chamars who profess Hinduism, but who eat beef and the flesh of dead animals are, however low in the scale, included within its pale. It is easier to say who are not Hindus, and practically the separation of Hindus from non-Hindus is not a matter of so much difficulty. The people know the differences well and can easily tell who are Hindus and who are not."

Gharpure in his 'Hindu Law' says that the term 'Hindu' has been given a liberal extension so that practically all persons who call themselves Hindus or could establish a usage as to their being governed by Hindu law are included in the term. Certainly those who believe in the authority of the Vedas, Smritis and Puranas and Agamas and in the worship of the gods of the Hindu pantheon are Hindus. But in construing the term in the application of Hindu law the inclusion of the Jains, Sikhs, Buddhists and Brahmos as Hindus clearly shows that the descendants of persons who are not completely ex-communicated from Hindu society on account of a change of religion are also classed as Hindus. In fact Sir Arthur Wilson, delivering the Judgment of the Judicial Committee in the above cited case observes at p. 29:

"It came to be known that there were religious bodies in India which had developed out of or split off from the Hindu system, but whose members nevertheless continued to live under the Hindu law".

His Lordship further says that the framers of the earlier Acts, Regulations and Charters had a less detailed acquaintance than we now have with the diversities of creed and religious law existing in India. As ethnological studies and researches progressed in the course of years, the question was discussed, whether the aboriginal tribes who have been completely absorbed in the community as well as those who have not been so completely absorbed were also included in the term 'Hindu' (Vide *Ram Pergash* v. *Mt. Dahan Bibi*[2]). The history of judicial decisions from the beginnings of the last century up to modern times will reveal to us how both the terms 'Hindu'

1. (1903) 13 M.L.J. 381: L.R. 30 I.A. 249: I.L.R. 31 Cal. 11 (P.C.).
2. (1924) I.L.R. 3 Pat. 152.

and 'Hindu religion' have received wider and wider interpretation and the furthest extension is reached in the decision of the Madras High Court in *Ratansi D. Morarji* v. *The Administrator-General of Madras*[1], where it has been held that even an English woman who has adopted the Hindu religion will be included in the term 'Hindu' for the purposes of the Succession Act. It was pointed out that the term 'Hindu' is used in the said Act in a theological as distinguished from a national or racial sense. The learned Judge, Justice Venkatasubba Row, observes:

> "To apply the Hindu law to a European may seem strange. But according to the law of British India, in the case of Hindus questions of personal law are determined not by the test of domicile, but by reference to the religious community to which that person belongs."

In the case in *Raj Bahadur, etc.* v. *Bishen Dayal*[2], it was held that it was only those that believe in the orthodox Hindu religion can be held to be Hindus to whom the Hindu law applies. But as time progressed and we came to the date of the decision of the Judicial Committee in *Rani Bhagwan Kuar* v. *Bose*[3], it was clearly laid down by the Board that any *lapses* from *orthodox practice* could not have the effect of excluding from the category of Hindu one who was born within it and who never became otherwise separated from the religious communion in which he was born. In fact, in that case the deceased to whose properties the succession arose was proved to have lived in the European style, ate at a table with Mahomedans, Christians, Parsis and others with whom Hindus are prohibited from eating by the Hindu customs and that he kept Mahomedan cooks. In fact, the lapse from orthodox practice cannot go very much farther.

It may be interesting to note how the original Hindu lawgivers themselves regarded the people of this country to whom they intended to apply their rules. A study of the tenth chapter of the Institutes of Manu clearly shows that the distinguishing feature of the Hindu race according to him, was their four typical communal organisations and the test is whether a person is born in this *varna* organisation with its multifarious *jatis* out of the intermixture of the four and that all those peoples who do not recognise this are not Hindus. In fact

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1. (1928) 55 M.L.J. 478: I.L.R. 52 Mad. 160.
2. (1882) I.L.R. 4 All. 343.
3. (1903) 13 M.L.J. 381: L.R. 30 I.A. 249: I.L.R. 31 Cal. 11 (P.C.).

Manu mentions all the various parts of India and classifies the people inhabiting all these parts under this system. It is under this belief that the law as embodied in the Hindu-law-books has proceeded, and all the Smriti writers and commentators have gone on the footing that all the people of India are included within the range of this organisation and that their rules apply to them as they are born within this community. It is only the historical investigations of modern scholars and antiquarians that have brought out the distinction between Aryans, Dravidians, aboriginal tribes and the mixture of Scythians, Sakas, Parthians, etc., and the influence of these investigations has also been reflected in the later judgments of the Judicial Committe. *Vide* the decision in *Palaniappa Chettiar* v. *Alagan Chetty*[1], where Lord Phillimore in discussing the custom of Patnibhaga among the Chettis of the Madura District refers to a quotation from Sir Thomas Strange's Hindu Law, *viz.*, that though the Brahmins were successful in extirpating the aboriginal religion of the south, they succeeded but partially in introducing the laws of the Smritis and were obliged to permit many inveterate practices to continue and observes: "It is possible that the matriarchal theories of the earlier inhabitants of Southern India may have led to the prevalence of this custom and caused the difficulty in the way of its being extirpated by the Brahmins. In *Sahdeo Narayandeo* v. *Kusum Kumari*[2], Lord Phillimore observed as follows "In *Fanindradeb Raikat* v. *Rajeswar Das*[3] already cited, it was an accepted matter that the family was of non-Hindu origin, but their Lordships nevertheless embarked upon the enquiry whether they had become Hindus "out and out" and in the recent judgment in *Palaniappa Chettiar* v. *Alagan Chetty*[1], it was accepted as an explanation of the custom of Putrabhaga that it was probably due to the Dravidian origin of the people in question who had retained some of their non-Hindu customs, though they had become Hindus and were governed by the general Hindu law. In that case authority was cited for considering the mass of tribes in southern India as having become Hinduised and subject to the law of the *Smritis* in most respects, though still adhering to particular customs." Thus as a result of decisions, it may be

1. (1921) L.R. 48 I.A. 539: I.L.R. 44 Mad. 740 (P.C.).
2. (1922) 44 M.L.J. 476: 50 I.A. 56: I.L.R. 2 Pat. 230 (P.C.).
3. (1885) L.R. 12 I.A. 72: I.L.R. 11 Cal. 463.

generally stated that the term 'Hindu' includes all those whether of Aryan or non-Aryan stock, whether orthodox or heterodox, whether conformists or dissenters such as the Jains, Sikhs, Brahmos, Arya Samajists, Lingayats, all Hindus whether legitimate or illegitimate by birth, provided one of the parents is a Hindu and the child is brought up as a Hindu.

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The existence of two proselytising religions like Christianity and Mahomedanism and the consequent conversion of Hindus either to Christianity or Mahomedanism has given rise to complicated questions in regard to succession, inheritance, marriage, adoption, etc., as to the applicability of the Hindu law to them. So early as 1850 the prevalence of conversion to Christianity led to the passing of the Caste Disabilities Removal Act, otherwise known as *Lex Loci* Act which applied the principle of S. 9 of Regulation 7 of 1832 of the Bengal Code throughout the territories of the East India Company and enacted that so much of any law or usage now in force within the territories subject to the Government of the East India Company as inflicts on any person forfeiture of rights or property or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing or having been excluded from the communion of any religion or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company and in the Courts established by Royal Charter within the said territories. The effect of these two enactments is stated to be, to virtually set aside the provisions of Hindu law which penalise renunciation of religion or exclusion from caste. It will of course be an interesting investigation, how far the Hindu-law-books really penalise change of religion. The texts relied on in the decisions are chiefly those of Manu, Sankha and Likhita. In the 11th chapter of Manu it is provided in verse 183 that the Sapindas and Samanodakas of an outcaste must offer water to him as if he were dead, outside the village on an auspicious day, in the evening and in the presence of relatives, officiating priests and others; and in verse 184 that a female slave shall upset with her foot a pot filled with water as if it were for a dead person. The text of Sankha and Likhita is as follows:

> "Of him who has been formally degraded the right of inheritance, funeral cake and the libation of water are extinct."

The decisions have regarded change of religion as rendering a person an outcaste and a degraded person, according to

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the Hindu law. Now, so far as one could see, the Smritis and the early commentaries like the Mitakshara do not provide in express terms as to the law applicable to a person who renounces or changes his religion. The definition of 'Patita' also does not include mere change of religion. In Colebrooke's Digest, Vol. II, p. 431, the definition given of a Patita by Brahma purana is quoted:

> "They who have committed crimes in the first degree are considered as degraded persons, *viz.*, the Mahapatakis."

In the list of Upapatakas given, we find the enumeration in the Yajnavalkya Smriti of "belief in Asat Sastra" which the Mitakshara annotates as *"atheism and the like."* But an Upapataka does not render a person a Patita. The Patitas, the Hindu-law-books treat, as persons excluded from inheritance, as 'Patita' is enumerated in the list of those who are excluded from inheritance such as the congenitally blind, the idiot, the eunuch, leper, etc. The texts also in the chapters relating to Prayaschitta provide expiatory penances and rites for the Patita, and it is pointed out that after undergoing such expiations his right of inheritance is also established. Though excluded from inheritance he and his offspring are liable to be maintained from out of the family property. The sons of the Patita born before he became Patita are not disqualified from inheritance. It is only the sons born after his degradation that are excluded from inheritance. The wives of outcastes have also to be maintained. The daughters born even after his degradation are not to be treated as outcastes. (*Vide* Vasishtha Smriti quoted in Aparарka. Dr. Jha's "Hindu Law in its sources", p. 97). In Colebrooke's Digest, Vol. II, p. 432, it said, quoting Vachaspati Bhattacharya:

> "Penance or other atonement which legalises his claim to property can only be performed with money begged during his fallen state from his son or some other person. *It is not proper to affirm that his property in wealth acquired during his fallen state is forfeited by reason af his degradation.*"

From the foregoing it is clear that though a degraded person is not entitled to inheritance, he has not forfeited his other rights, and though he is regarded as an outcaste, he is not an outlaw or one beyond the pale of Hindu law.

These texts find a place in the context relating to the provision of expiatory ceremonies for Mahapatakas, etc., and they in effect enjoin that they should be treated as outcastes from the family. From this it does not follow that either

they cease to be Hindus or are beyond the pale of Hindu law. The difficulty, if it all, arises only from the fact that when a person renounces his religion and becomes a Mahomedan or a Christian, the Mahomedan law may apply to him or the Indian Succession Act in respect of the Christian.

The Judicial Committee in *Abraham* v. *Abraham*[1], state that their conclusion appears to be supported by authority and rely on the passage of W. H. Macnaughten's 'Hindu Law', Vol. II, pp. 31-32 that:

> "On the death of an apostate from the Hindu faith his heirs according to the Hindu law will take all the property which he had at the time of his conversion; and the marginal note states that his subsequently acquired property would be governed as to its devolution by the law of his new religion. The important part which they (Pandits) declare is the separation of the convert from the binding force of the Hindu law as to his subsequent acquisition."

In *Sinammal* v. *The Administrator-General of Madras*[2], the note in Vyavasthachandrika is relied on, which states that change of religion is regarded by Hindu law as degradation. If therefore change of religion is regarded in the eye of the law of the Smritis as degradation, the consequence necessarily follows that according to that law the degradation may be atoned for and a convert re-admitted to his status. Hence in *Administrator-General of Madras* v. *Anandachari*[3], the High Court observes that the convert might be re-admitted to his status as a Brahman had he had at any time during his life renounced Christianity and performed the rites of expiation enjoined by his caste. In castes where no expiatory ceremonies are necessary he can be reconverted without them. *Gurusami Nadar* v. *Irulappa Konar*[4]. So far as marriage is concerned, it was held in a series of decisions that among Hindus the degradation of apostasy does not of itself dissolve the marriage tie. (Vide *Government of Bombay* v. *Ganga*[5]; *Administrator-General of Madras* v. *Anandachari*[3] and *Emperor* v. *Lazar*[6] and the other cases which followed them). Construing Act, XX of 1850 and Regulation IX of 1832, it was held in *Bhagawant* v. *Kallu*[7], that a Hindu can have a right of inheritance to the properties

1. (1863) 9 M.I.A. 195 at 238.
2. (1884) I.L.R. 8 Mad. 169.
3. (1886) I.L.R. 9 Mad. 466 at 470.
4. (1934) 67 M.L.J. 389.
5. (1880) I.L.R. 4 Bom. 330.
6. (1907) 17 M.L.J. 476: I.L.R. 30 Mad. 550.
7. (1888) I.L.R. 11 All. 100.

of a Hindu convert to Mahomedanism. But the Judicial Committee in *Mitar Sen Singh* v. *Maqbal Hasan Khan*[1] overruled that construction and gave effect to the general proposition that, once a person changed his religion he changed his personal law and that law would govern the rights of succession of his children.

But a convert to Mahomedanism retained, it was held, his right to give his son in adoption to a Hindu, *Shamsing* v. *Santabai*[2]. No doubt the Judicial Committee in *Abraham* v. *Abraham*[3], in construing the term 'Hindu' in the Madras Regulations which prescribed that the Hindu law shall be applied to Hindus and the Mahomedan law to Mahomedans, held that they must be understood to refer to Hindus and Mahomedans not by birth merely, but by religion also. And it is on account of this also that their Lordships decided that the term "Hindu" cannot be applied to those who do not belong to the Hindu religion. A distinction was sought to be made so far as conversion to Mahomedanism was concerned in *Abraham* v. *Abraham*[3] that after conversion to Mahomedanism, the Mahomedan law applied; but so far as Christianity was concerned, the conversion to Christianity does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his rights, interests and powers over his property. In *Jowala Buksh* v. *Dharum Singh*[4] so far as the Mahomedan law was concerned, it was held that upon conversion, in matters of rights to property also, the Mahomedan law would apply as the Mohamedan law regulated the rights to property of all Mahomedans, though they left open the question whether it is competent for a family converted from the Hindu to the Mahomedan faith to retain for several generations Hindu usages and customs and by virtue of that retention to set up for itself a special and cusomary law of inheritance. After the passing of the Indian Succession Act it has now been finally decided by the Judicial Committee in *Kamawati* v. *Digbijai Singh*[5] that if the dceased was a Christian at the time of his death, the succession is governed, in regard to the questions to which the Succession Act applies, by the Succes-

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1. (1930) 57 I.A. 313.
2. (1901) I.L.R. 25 Bom. 551.
3. (1863) 9 M I.A. 195.
4. (1866) 10 M.I.A. 511.
5. (1921) 42 M.L.J. 87: L.R. 48 I.A. 381: I.L.R. 43 All. 525 (P.C.)

sion Act. But in cases where there are no statutory enactments of British India the rule in *Abraham's case* will still apply. Vide *Muhamad Aliyar* v. *Gnana Ammal*[1].

It seems also to be accepted that the Hindu religion admits of conversion to it from other faiths. In the case in *Sher Bahadur Singh* v. *Ganga Bakhsh Singh*[2] the Privy Council has quoted the observations of the Judicial Commissioner which were as follows:

> " The Subordinate Judge has cited several authorities to show that the Hindu religion admits proselytes of all kinds. The truth of this is indisputable."

There the question arose as regards the status of a person who was born of a Hindu father by a Mahomedan woman who was his mistress. As has been already observed, it is also difficult to define what is understood by 'Hindu religion'. An element of great vagueness has therefore been introduced in the application of Hindu law. There are fresh sources of confusion also after the passing of the Special Marriage Act of 1872, later amended by the Act of 1923. According to it marriages may be celebrated between persons neither of whom professes the Christian, the Jewish, the Hindu, the Mahomedan, the Parsi, the Buddhist, the Sikh or the Jaina religion or between persons each of whom professes one or other of the following religions, Hindu, Buddhist, Sikh or Jaina religion. It has been held in *Jnanendra Nath Ray* in re,[3] that even though two Hindus by birth belonging to the Hindu religion declare that they do not profess the Hindu religion for the purposes of the Special Marriage Act, still they would be Hindus for the purposes of the Probate and Administration Acts, so that a declaration that he is not a Hindu by religion for the purposes of that Act will not have the effect of making him cease to be a Hindu. Under the Amendment Act of 1923 even without any such declaration valid marriages may be contracted in all the communities of Hindus and between Hindus, Buddhists, Sikhs or Jains. All these provisions will have far-reaching consequences in the future as regards the meaning to be given to the terms 'Hindu' and 'Hindu religion' in cases of the application of rules of the Hindu law to them. The early British administrators began by recognising only two main

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1. (1934) 66 M.L.J. 671.
2. (1906) 26 M.L.J. 291: L.R. 41 I.A. 1: I.L.R. 36 All. 101.
3. (1922) I.L.R. 49 Cal. 1069.

classes, Hindus and Mahomedans in India and applied their personal law to them respectively, but after the progress of British rule and with the increasing contact of western civilisation and the consequent change in the ideals, views and modes of life and habits of the Hindus and with their rising political and nationalistic ambitions, there is bound to be a great deal of change in the interpretation of the terms 'Hindu' and 'Hindu religion', and in the rules of the Hindu law itself. The change seems to be inevitable in the direction of more and more legislative modifications which may, in the end, culminate, in the entire *supplanting of the present Hindu law by statute law.* There is already an attempt in Mysore for codifying the entire Hindu law for the Mysore province. But we are at present concerned here as to the way in which the Hindu law is ascertained from its sources and administered as a personal law mainly subject to the modifications introduced by legislative enactments. As I have already pointed out, it was due mainly to the interest which Warren Hastings took in the study of Hindu religious literature and philosophy aided also by the researches of Sir William Jones who translated the laws of Manu and published it in 1794 in Calcutta, that a great impetus was given to the acquaintance of English administrators with the sacred books and the laws and usages contained in them and it was as an outcome of their deep appreciation of this study that the provision in the regulation of 1780 and in the Act of 1781 for the application of Hindu law and usages in questions of inheritance, succession, etc., among Hindus was introduced and the system of appointing Pandits to assist the Court in expounding that law was established. The consideration of the Policy of the introduction of these enactments establishes the fact that these laws were recognised more as usages of the families from which the suitors before the company's Courts and the supreme Court came which are indissolubly connected with their religion, rather than in the application of the civil law of the conquered country to the inhabitants of such conquered territory. It was more because in experience they found that there were some general usages which were being followed by the majority of the Hindu population inhabiting the Company's territories that the early British judges spoke of a general Hindu law. In fact this strong underlying consciousness in the minds of the early European writers on Hindu law and European judges is indicated by the observa-

tions of the Chief Justice of Allahabad which were disapproved by the Judicial Committee in *Bhagwan Singh* v. *Bhagwan Singh*[1] in the following words:

" Their judgment give no countenance to the conclusion that in order to bring a case under any rule of law laid down by recognised authority for Hindus generally evidence must be given of actual events to show that in point of fact the people subjected to that general law regulate their lives by it. The law was ascertained by the usual methods of ascertaining general law by reference to authoritative text-books, to judicial decisions and to the opinion of Pandits. These authorities were found to be sufficient proof of the general Hindu law prevailing over large tracts of country and populous communities. Anybody living among them must be taken to fall under these general rules of law, unless they could show some valid, local, tribal or family custom to the contrary. It seems to their Lordships that to put one who asserts the rule of law under the necessity of proving that in point of fact the community living under the system of which it forms part is acting upon it, or defeat him by assertions that it has not been universally accepted or acted on, would go far to deny the existence of any general Hindu law, and to disregard the broad foundations which are common to all classes, though divergencies have grown out of them."

(*To be continued*).

SUMMARY OF ENGLISH CASES.

RUSSIAN AND ENGLISH BANK AND FLORANCE MONTEFIORE GVEDALLA *v.* BARING BROTHERS AND COMPANY, LIMITED, (1936) A.C. 405.

Companies Act, 1929—*Russian Bank—Branch in London—Dissolution of Bank in Russia by soviet decrees—Effect of on England Branch—Debt due to English branch—Order to wind up under S.* 338—*If liquidator entitled to commence action in name of Bank to recover debts.*

A foreign company incorporated in 1910 according to Russian Law at Russia was doing Banking business in England from 1915. The Bank did business till June, 1920, *i.e.*, for more than 2 years after the Bank, as a result of Soviet decrees had ceased to exist by Russian law. In 1917 there were left in the hands of the respondent Co., for the account of the London Branch certain sums and as the company refused to recognise the claim of the Bank to have these moneys paid over to it, the Bank filed a suit to recover these sums with interest. But that was dismissed as not maintainable as the Bank had ceased to exist in Russia prior to the date of the suit. In 1932 a creditor's petition was filed for a winding up and an order was made under S. 338, sub-section (1) (*d*) (ii) of the Companies Act on the evidence adduced that the Bank, an unregistered Company, had in Russia been *dissolved* with its affairs in this country unliquidated. The liquidator with leave of the

1. (1898) L.R. 26 I.A. 153 at 164, 165, 166: I.L.R. 21 All. 412 (P.C.).

Court and with the authority of the committee of inspection commenced an action for recovery of those sums.

Held, by *Lord Blanesburgh, Lord Atkin and Lord Macmillan* that by virtue of S. 338 sub-section (2) and S. 342 together, the legislature has intended that the dissolution in the foreign country shall be ignored and actions taken in the liquidation of the Bank as a foreign corporation. As a result the Bank is to be deemed by the statute to be a company under the Act and therefore the liquidator can use the name of the Bank to sue to recover these sums alleged to be due to it.

Per *Lord Russell of Killowen and Lord Maugham* dissenting:—On dissolution in the foreign country, the corporation ceased to exist and the property which it owned in England thereupon became the property of the Crown. After the lapse of 14 years, an order is made under S. 338. On that order it cannot be contended in the absence of specific legislative provision, that dissolved foreign corporations can arise from the grave in full life and vigour and be entitled to sue to recover property which for 14 years and more has been the property of the Crown. The plaintiff in the present action remains, notwithstanding the winding up order, a non-existent person and cannot sue.

CHRISTIE AND OTHERS *v.* THE LORD ADVOCATE ON BEHALF OF THE COMMISSIONER OF INLAND REVENUE, (1936) A.C. 569.

Revenue—Estate duty—Finance Act 1894, *S.* 1—*Tenant for life with an aliquot-share of income from settled property—Death of—Succession to—Estate duty payable.*

A testator, after providing for his debts, funeral and administrative expenses, some legacies, etc., further provided as follows:—"after payment of the foregoing provisions my trustees shall divide the balance of the annual income of the trust into ten equal shares and shall pay five of these to my said wife and one to each of my four daughters and my sister-in-law during their respective lives . . . Should any of my daughters die leaving issue, the share of income which would have been payable to her shall be applied for the maintenance and education of her issue until the youngest of them shall have attained the age of 21 years and thereafter shall be paid in equal portions during their lives to such of them only as are daughters". After providing for certain contingencies, the testator stated that "after the death of his wife no beneficiary should receive more than 600*l* per annum from the income of the trust, and that the balance should be paid in other ways, mentioned in the will. The testator was survived by his wife, his four daughters and his sister-in-law. His four daughters all attained the age of 19 years and therefore for some time the income was paid half to the widow and one tenth to each of the other beneficiaries. One tenth of the income amounted to about 2800*l*. In 1933 Mrs. *N* one of the four daughters died leaving

behind 3 children, a boy 12 years old and two girls of 9 and 7. Mrs. *N's* mother was then alive. The trustees were assessed to estate duty in respect of part of the trust fund alleged to have passed on the death of Mrs. *N*, on the footing that the property which so passed was 1|10th of the whole trust estate.

Held, that the case is one in which property passed within the meaning of S. 1 of the Finance Act, 1894 and that the property which passed on the death of Mrs. *N* was the settled property which produced the one-tenth income to which she was entitled immediately before her death, and which immediately thereafter became applicable for the maintenance and education of her issue. The Finance Act has no regard to the destination of the property which passes on to the interest of the deceased, which, if it be a limited interest, can never pass.

Cowley v. *Commissioners of Inland Revenue*, 1899 A.C. 198 applied.

BROWNE *v.* MOODY AND OTHERS, (1936) A.C. 635=105 L.J.P.C. 140.

Will—Construction—Direction to pay income from a fund to son for his life and afterwards to divide among named daughters and grand-daughter—No direct wards of gift—Fund directed to be divided on son's death—Absence of any condition personal to the daughter's or grand daughters for vesting—If daughters and grand daughter take vested rights—Clause providing for the contingency of any remainderman predeceasing the son—Effect of.

A testatrix, who died in 1930 by Cl. (5) of her will directed that the income arising from a fund of $1,00,000 should be paid to her son during his life time and that on the death of the said son the said sum should be divided as follows:—

"One half of the said fund to my grand-daughter . . . and the remainder . . . to be divided equally between my daughters . . . share and share alike". By Cl. (6) she devised all the rest and residue of her estate to her grand-daughter and her three daughters share and share alike. By Cl. (7) she provided as follows:—"In the event of my grand-daughter . . . or any of my said daughters predeceasing me or predeceasing my said son, leaving issue, I direct that the child or children of the person so dying shall take the interest to which their mother would have been entitled had she survived." All the beneficiaries mentioned in clauses 5, 6 and 7 survived the testatrix and are still alive. Each of the three daughters has married and has issue. The question was raised whether the grand-daughter and daughters of the testatrix had vested interests in the fund. The Chief Justice of the High Court for Ontario, and the Supreme Court of Canada, held that no vested interest in the fund was acquired by the grand- daughter and daughters at the death of the testatrix, on the grounds that in Cl. (5) there are no words of present gift to the daughters

and grand-daughter but only a direction to divide the fund among them on the occurrence of the sons's death, that the fund is treated as separate and distinct from the estate disposed of in the will, that while the other clause of disposition says "I give, devise and bequeath', there are no such words in Cl. (5) and finally that the words "the interest to which their mother would have been entitled had she survived" in Cl. (7) mean that "the mother takes no title to that interest unless she survives both the testatrix and her son, and that is to say till time of distribution".

Held, by the Judicial Committee that they took a vested interest on the death of the testatrix. "The date of division of the capital of the fund is a *dies certus,* the death of the son of the testatrix, which in the course of nature must occur sooner or later. In the next place the direction to divide the capital among the named beneficiaries on the arrival of that *dies certus* is not accompanied by any condition personal to the beneficiaries, such as their attainment of majority or the like. The object of the postponement is obviously only in order that the son may during his lifetime enjoy the income. The mere postponement of distribution to enable an interposed life tenant to enjoy will not exclude vesting of the capital. "Where there is a direction to pay the income of a fund to one person during his lifetime and to divide the capital among certain other named and ascertained persons on his death, even although there are no direct words of gift either of the life interest or of the capital, the rule is that vesting of the capital takes place *a morte testatoris* in the remaindermen". Cl. (7) does not qualify the title to the share or postpone the vesting till the period of division. "Would have been entitled had she survived", is to be read as merely demonstrative of the share in question. A legatee predeceasing the son without leaving issue would not be affected by the later clause Cl. (7) and the interest of such a legatee would pass on her death to her representatives. The contingency of death "leaving issue" does not prevent vesting *a morte* but it prevents that vesting from being absolute, and renders it subject to divesting in the event of this specified contingency happening.

KNOWLES *v.* SOUTHERN RAILWAY COMPANY, (1936) 2 K.B. 330=105 L.J.K.B. 350.

Workmen's compensation—Workmen's Compensation Act, 1925, S. 1—Accident—Rule prohibiting drinking intoxicating liquor by employees—Employee leaving the cart and going to drink —Returning after drink and getting into cart—Slipping and falling down while so getting up into the cart—Accident—If in the course of employment.

A workman *K* was employed as a van driver by S. Ry. Co. He was sent on duty from the railway company's Tooley Street

depot to take a load to their depot at Nine Elms. While on his way from Tooley Street to Nine Elms, *K* stopped his van outside a public house. Then he descended from the box seat having first drawn into the near-side kerb, put a chain on the near-side hind wheel, removed the near-side trace and threw it over the back of the near-side horse, and put the reins through a brass ring on the harness. Leaving the van in charge of the boy, he crossed to the public house, took beer and went back straight to the van to resume his duty. *K* having removed the chain from the wheel and replaced the trace and taken the reins in his hands, was in the act of mounting to the box seat. The horses suddenly moved on and thereby he slipped and fell under the wheel of the van and sustained injuries and died. It was a rule of the company of which the deceased had notice that "Employees must not consume intoxicating liquor while on duty".

The County Court Judge held that at the moment of mounting the box he was in the course of employment, having returned to the employment, and that the rule merely regulated the man's conduct in his employment and did not limit the scope of his employment.

Held, on appeal, that *K* left his box seat for a prohibited purpose, and remounting the box was the last stage of the execution of his prohibited purpose and he was therefore not doing anything for the purpose of, and in connection with his employer's business. Until he had mounted the van to perform his duty to drive, he was concerned only for his own purposes to get back into a position to perform his duty, an ability to do which he had himself interrupted for his own purposes. The act which was the mounting of the box, though ordinarily incident to the deceased's employment, was done on this occasion not for the employer's purposes, but to enable the workman to resume his wrongfully interrupted employment and to get back into the place where he could again perform his duty.

MORLEY *v.* MOORE, (1936) 2 K.B. 359=105 L.J.K.B. 421.

Insurance—Injury to motor car of plaintiff—Plaintiff's insurance company paying part of damage—Knock-for-knock agreement with defendant's insurance company—Suit against defendant for full amount—If amount can be recovered—Effect of knock-for-knock agreement.

The motor car of the plaintiff was damaged in collusion through the defendant's negligence to the extent of 33*l.* odd. Under an insurance policy he recovered 28*l.* odd from his own insurance company, he being himself responsible for the balance of 5*l.* under the terms of his policy. The defendant was also insured and there was between his insurance company and the plaintiff's insurance company a knock-for-knock agreement, the purpose of which was

that each insurance company is to pay its own assured, without question, that which the assured is entitled to receive under the particular policy, and that both of them are to do their utmost to discourage either of their own assured from making claims against the other. The plaintiff's insurance company paid 28*l.* and directed him not to claim from the defendant. But the plaintiff filed this suit in tort against the defendant for recovery of the 33*l.* odd.

Held, that the mere fact that the plaintiff's own insurance company have paid the particular loss is not a thing which the defendant, the wrong doer, can set up in diminution of damages. The mere fact of his insurance company's request to him not to claim because of the knock-for-knock agreement did not also prevent the plaintiff from claiming, in the absence of any fresh contract between the insurance company and the plaintiff disabling him from suing. If the assured by some process of recovery, obtains a payment in diminution of the loss, the underwriters or the insurers are entitled to the excess over the amount paid by them to him by way of strict indemnity and no more.

GEORGE TROLLOPE AND SONS *v.* CAPLAN, (1936) 2 K.B. 382= 105 L.J.K.B. 819.

Damages—Principal and agent—Estate agents—Contract with defendant to find purchaser for property—Representation by defendant that rent was 180l.—Intending purchaser so informed—Defendant then stating that rent was in fact less—Withdrawal by purchaser—Agent's claim for damages.

The defendant requested the plaintiff's estate agents to find a purchaser for their property and stated that part of that property was let at 180*l.* per annum. The plaintiffs found an intending purchaser "subject to contract" for the price for which the defendants wanted, but after negotiations proceeded some distance, the defendant stated that the rent of the shop should have been given as 145*l.*, as that was the rent which he had verbally agreed to, though in the lease the rent was given as 180*l.* The purchaser thereupon required a proportionate reduction in the price but as that was not agreed to, the transaction went off. Thereupon the estate agents filed this suit claiming damages on the ground that as the transaction was not completed owing to the defendant's mistaken statement as to rent, they were entitled to the commission that they would have earned had the sale been completed. The Country Court judge held that the plaintiffs had done everything they undertook to do, and every term in the proposed contract had been agreed to "subject to contract". And as the contract was not completed by the defendant's mistake, the plaintiffs were entitled to damages equal to the full amount of the commission they would have earned had the transaction gone through.

Held, on appeal, that the plaintiffs had done all the work which is expected from an agent, but their work, having regard

to the offer being "subject to contract" might not have resulted in a sale which would have entitled them to their commission. There were other terms which would have to be settled between vendor and purchaser before the commission would become due, but the plaintiff having done all the agency work the defendant was liable. But the damage cannot be the full commission unless it was clear that but for this rent difference the transaction would have been complete, as the contract was 'subject to contract'. The Court must in assessing damages take into consideration the risk that there was that the defendant and the proposed purchaser might never have come to an agreement with regard to the several matters that would have to be settled before there could be a concluded contract as between the vendor and the purchaser, including especially the date of completion.

CRAVEN-ELLIS *v.* CANONS, LIMITED, (1936) 2 K.B. 403=105 L.J.K.B. 767.

Companies Act, 1929, *Ss.* 141, 143—*Appointment of managing director—Work done by director—Qualification shares not obtained—Claim for work done on* quantum meruit.

The plaintiff was a valuer and estate agent. In 1927, Sir *A* and his son *P* became interested in the development of a building estate known as Canons estate. They requisitioned the services of the plaintiff and he agreed to serve on certain terms settled between them for 3 years. In 1928, Canons Limited, was formed to purchase this estate and the plaintiff continued to do the work for this new company. There was no fresh agreement but the company received and accepted the services he was rendering. Certain directors were appointed who executed an agreement in favour of the plaintiff stating the terms on which he was to act as managing director of the company. Until the company purported to put an end to this agreement the plaintiff continued to do the services. Under the Articles, a director must obtain qualification shares within two months but neither the directors who appointed the plaintiff nor the plaintiff obtained the shares.

Held, that the plaintiff was entitled on *quantum meruit* basis for work done. The directors not having obtained the qualification shares, they had no authority after those two months to act for the company. The contract was therefore not binding on either party. It was, in fact, a nullity and therefore it presents no obstacle to the implied promise to pay on a *quantum meruit* basis which arises under law from the performance of the services and the implied acceptance of the same by the company. It is an obligation imposed by law in all cases where the acts are purported to be done on the faith of an agreement which is supposed to be but is not a binding contract between the parties. If the contract were an effective contract by the company, they would be bound to pay the remuneration, the basis of remuneration being *quantum meruit, i.e.*, what

the company would have to pay if they would have had to get some other agent to carry it out.

DAVIS *v.* LISLE, (1936) 2 K.B. 434=105 L.J.K.B. 593.

Police—Entry into private premises to enquire regarding suspected offender—Owner of premises asking him to leave premises—Police officer nevertheless remaining there—Assault by owner—If guilty of assaulting a police officer "in execution of duty".

Two police officers on duty, one of whom respondent was in plain clothes and the other in uniform, noticed a motor lorry, which in their opinion was causing an obstruction in the highway, outside the garage. Two men were repairing the lorry in the highway and committing an offence under S. 54 of Metropolitan Police Act, 1839. The lorry later was removed into the garage. Then the police officers went into the garage to enquire as to the persons responsible for the obstruction. Neither of these police officers requested or obtained permission to enter the garage, and neither possessed or was authorised by, a search warrant to enter the garage. The apellant, a member of the railway firm, then entered the garage and asked them to leave but on their continuing to stay assaulted and drove away the respondent.

Held, that the officers were not, at the time of the assault, acting in the execution of their duty. It may be that the officers were at liberty to enter the garage to make an inquiry, but from and after the time the appellant said 'get outside, You cannot come here without a search warrant', the officers by remaining there were trespassers and not acting in execution of their duty. But how far the extent of the assault was justified was to be determined on the footing that they were trespassers.

REX *v.* GEE. REX *v.* BIBBY. REX *v.* DUNSCOMBE, (1936) 2 K.B. 442=105 L.J.K.B. 739.

Criminal Law—Indictable offence—Committing justices—Depositions irregularly taken—Committal—If valid—Indictable Offences Act, 1848, *S.* 17.

The appellants were convicted of the offence of shop-breaking. Before the committing justices the witnesses were examined by the chief constable from a prepared type-written statement, analogous to a proof, copies of which were handed over to the magistrates and their clerk. Nothing was taken down by the magistrates but the prepared statement was checked by the clerk and then signed by the witnesses. They (witnesses) were not furnished with a copy of the statement. The appellants were committed to the quarter sessions and convicted by them.

Held, that the committal and conviction were illegal. The proceedings were so defective that there was no lawful commitment at all for trial. There has been a mistrial and a proper trial ought to be ordered but as the appellants had been in custody for a sufficiently long time, the convictions were quashed.

HOLLYWOOD SILVER FOX FARM, LIMITED *v*. EMMETT, (1936) 2 K.B. 468=105 L.J.K.B. 829.

Nuisance—User of one's land—Maliciously doing acts on one's lands to injure the neighbour—If can be restrained.

The plaintiff purchased a large plot of land to start business as a breeder of silver foxes and created a number of pens in which to keep them and started business with thirteen vixens and twelve dog foxes. On the north-east of it was the defendant's field. Silver foxes breed once a year between January and May, and during the breeding season the vixens are extremely nervous. Any loud unusual noise upsets them and may put a vixen off mating, cause miscarriage and even make it devour its young. In April the defendant maliciously with a view to injure the plaintiff asked his son to discharge a gun loaded with black powder at the boundary of his land nearest to the pens. The shooting greatly alarmed the vixens and the plaintiff suffered considerable damage by some vixens refusing to mate, etc.

Held, that no owner has an absolute right to create noises upon his own land, because any right which he has under law is qualified by the condition that it must not be exercised to the nuisance of his neighbours or of the public. If he violates that condition he is guilty of a legal wrong and if he does so intentionally he is guilty of a malicious wrong and can be restrained by an injunction from committing such a nuisance and liable to damages.

Bradford Corporation v. *Pickles*, (1895) A.C. 587, has not overruled the cases in *Keeble* v. *Hickeringill*, (1706) 11 Mod. 74, *Gaunt* v. *Fynney*, (1872) *L.R.*, 8 Ch. 8 and *Ibottson*, v. *Peat*, (1865) 3 H. & C. 644.

DODWORTH (H. M. INSPECTOR OF TAXES) *v*. DALE, (1936) 2 K.B. 503=105 L.J.K.B. 586.

Income-tax—Finance Act, 1920, *S*. 18—*Incometax Act*, 1918, *S*. 125—*Assessments made on foot of assessee being a married man—Marriage declared null on ground of wife's impotency after the year of assessment—If prior assessments can be re-opened.*

In the years from 1921 to 1932 both inclusive, the respondent, having declared in the income-tax returns made by him that he had a wife living with him or that his wife was wholly maintained by him during the years of assessment, was granted the statutory personal allowances applicable to a married man during those years,

under S. 18 of the Finance Act, 1920, sub-section (1). That section provides that "The claimant, if he proves that for the year of assessment he has his wife living with him, or that his wife is wholly maintained by him during the year of assessment, and that he is not entitled in computing the amount of his income for that year for the purposes of the Income-tax Acts to make any deduction in respect of the sums paid for the maintenance of his wife, shall be entitled to a deduction". In 1933 a decree of nullity of marriage was obtained on the ground of the incapacity of the wife to consummate the marriage. Thereupon the Inspector of taxes imposed additional assessments representing the personal allowances obtained by the respondent in the years 1928-29 to 1932-33 under Cl. (1) of S. 125 of the Income-tax Act, 1918, which provides that "If the surveyor discovers . . . that a person chargeable has been allowed, or has obtained from and in the first assessments, any allowance, deduction . . . not authorised by this Act, then and in every such case" the surveyor might make or have made an additional assessment. The decree of nullity declared "the marriage in fact had and solemnised on 22nd October, 1921, . . . to have been and to be absolutely null and void to all intents and purposes in the law whatsoever", etc.

Held, that a marriage which is null on the ground of the incapacity of one of the spouses is voidable and not void; but when avoided, it is void *ab initio*, but not for all purposes. The wife referred to in S. 18 of the Finance Act includes a *de facto* wife whose marriage is otherwise regular and can be declared null on the ground of incapacity due to impotence. Transactions which have been concluded, things which have been done, during the period of the supposed marriage, cannot be undone or re-opened after the marriage has been declared null and void. The revenue authorities had no power to make a fresh assessment by reason of the fact which arose after the year of assessment, the fact being that the husband had determined to exercise his option and exercised his option to avoid the marriage.

ENGLISH *v.* BLOOM AND THE LONDON PASSENGER TRANSPORT BOARD, SIEGENBERG *v.* SAME, (1936) 2 K.B. 550=105 L.J.K.B. 659.

Costs—Single accident—Two passengers injured—Two suits through one solicitor—If proper—Damages deposited in Court—Reduced in case of one and increased for the other plaintiff—Proper order as to costs.

E and *S* were both passengers in a taxicab owned and driven by *B* (1st defendant). The taxicab was caught between two tramcars owned by the 2nd defendants Transport Board. The plaintiffs sustained personal injuries thereby and it was admitted that both the defendants were negligent. Both the plaintiffs

engaged the same solicitors but two separate writs were issued one on behalf of each. Separate claims were delivered and at the request of defendants the two actions were consolidated. The court awarded 200*l*. to *E* and 185*l*. to *S* as damages. With the defence the defendants paid 225*l*. as for *E* and 125*l*. as for *S* into court as admitted damages.

Held, that there can be two writs. It is at the option of the plaintiffs to issue one or more writs. As for costs, the court passed the following order considering that *S* got more than the deposited amount and *E* less.

Judgment for *S* for 185*l*. and costs including the costs of the consolidated action, except in so far as directly attributable to the claim of *E* after the date of payment into court.

Judgment for *E* for 200*l*. and costs up to the date of payment into court. *E* to pay to the defendants any costs of the consolidated action arising after the date of payment into court which are directly attributable to his being a party to the consolidated action.

GASKELL AND CHAMBERS, LIMITED *v*. HUDSON, DODSWORTH AND COMPANY. *Ex parte* GASKELL AND CHAMBERS, LIMITED (1936) 2 K.B. 595=105 L.J.K.B. 734.

Contempt of Court—Action for slander of goods—Publication by defendants' agent of plaintiff's statement of claim with his comments pending the suit—If and when contempt of Court.

The plaintiffs G. C., Ltd., were manufacturers and sellers of fittings for hotels and public houses and in particular of apparatus for conveying beers from cellar to bar. The defendants were also manufacturers of another apparatus for the same purpose. The suit was brought by the plaintiffs for damages and for an injunction on the ground that the defendants had falsely and maliciously caused to be published to brewers letters containing statements disparaging the plaintiffs' apparatus as being obsolete and anti-hygienic. A copy of this claim was served on the defendants The defendants' agent *H*, without the knowledge of defendants sent up copies of this claim to certain brewers with a letter containing the words "since the commencement of this business our sales have shown considerable increases week by week and this unbounded success seems to have aroused the rabid jealousy of Messrs. G. C., Ltd., as shown by the enclosed 'statement of claim' which we received from them . . . we refuse to be intimidated by these actions, and we intend to contest this 'cock and bull' claim to the uttermost degree". The plaintiffs thereupon moved for contempt of court in publishing this letter and the statement of claim pending trial of the action.

Held, that publication of pleadings in an action may in certain circumstances amount to a contempt of court; while in other cir-

cumstances it may not. Making unfavourable comments upon another party to the action may amount to a contempt of court, though it will not in every case be a contempt of court. Even if it be established in a particular case that something has been done which does amount to a contempt of court, an application for attachment or committal ought not to be made, unless that contempt is calculated really to interfere with a fair trial. The pleading published here is of the opposite side and further the letter only repeats the slander complained against in suit and that repetition cannot amount to contempt.

Reg. v. *Payne and Cooper*, (1896) 1 Q.B. 577, applied.

NEWELL *v.* CROSS, COOK, PLUME, CHENERY, (1936) 2 K.B. 632=105 L.J.K.B. 742.

Road Traffic Act, 1930, *Ss.* 61 *and* 72—*Taxicab run without road service licence as Express carriage—Hire of taxicab by* A—*Six others being taken by* A *with agreement to rateably contribute to the hire—Vehicle an* Express *carriage—No antecedent contract to contribute—Not an express carriage.*

Miss *C* saw one Cook, a taxicab driver and arranged with him that he should convey her and certain of her friends to a certain place *S* and back for a fixed price. Cook picked up Miss *C* and six other ladies at different addresses and conveyed them to *S*. Similarly Mrs. *P* arranged with another taxicab driver Chinery to take her and her friends to *S* and back for 14*s*. irrespective of the number of passengers. Neither the drivers nor Miss *C* nor Mrs. *P* held a road service licence or a public service vehicle licence. On the way a police constable stopped the cabs and a traffic examiner asked Mrs. *C* as to the terms of the drive and she stated that she was paying Cook 14*s*. for the journey and that she would collect 2*s*. from each of her six friends in the cab. As for Mrs. *P* she paid Chinery 14*s*. before starting, no part of which was stipulated to be paid by her friends, though they subsequently paid her 2*s*. each. Miss *C* and Mrs. *P* and their drivers were charged under Road Traffic Act, 1930, Section 72, sub-section (10) for unlawfully causing a motor vehicle to be used as an *express* carriage, without a licence therefor.

Held, that the drivers did not know and had no reason to know that any part of such fare was or would be paid by the other passengers and were not therefore guilty. As for Miss *C* it was in her mind before the contract that she was to collect, and was entitled to collect, from each one of her fellow passengers a rateable contribution. The passengers were therefore "carried in a motor vehicle in consideration of separate payments made by them" within the meaning of S. 61, sub-section (2) and therefore it became by virtue of that sub-section "a vehicle carrying passengers for hire or reward at separate fares" and consequently an express

carriage under sub-section (1) of S. 61. As it was used though unwittingly without the licence, Miss *C* was liable under sub-section (10).

But as for Mrs. *P*, she paid 14*s*. before starting and no contribution was asked for towards the charge made from the other passengers in the taxicab. There was nothing to indicate that contributory payments were contemplated at the outset or formed any part of a contract or bargain. Therefore she was not guilty.

Held, further that when a police officer questioned the persons in the taxicab, it was his duty to have administered a warning to them that there was no duty cast on them under the Road Traffic Act to furnish the information as to who is paying the fare.

JOTTINGS AND CUTTINGS.

Conditions and Parental Duty.—Long ago it was said in a book which, like Coke upon Littleton, has the force of law mainly because it is so old, that a condition the effect of which is "to restrain or forbid a man the doing of his duty is for the most part void": Shep. Toutch: I, 132. The maxim, indeed, hardly requires antiquity to recommend it, and it seems to be needlessly qualified by "for the most part." But it was aptly applied by Bennett, J., in *Re Borwick*, (1933, Ch. 657; 102 L.J.Ch. 199), where a condition in a settlement requiring a grandchild of the settlor to be a Roman Catholic on pain of forfeiting his benefit was held to be void because it operated to interfere with the parent in the exercise of his parental duty as regards the religious instruction of his children. And this has been followed by Farwell, J., in *Re Tegg*, (1936) 2 All. E.R. 878), where a testator in giving a weekly sum of 2*l*, to his daughter, and if she predeceased him the capital to her children, added a condition that the daughter and her children should "at all times conform to and be members of the Church of England and that no child should be sent to a Roman Catholic School." The learned Judge rejected the first branch of the condition for uncertainty. He did not know what "conform to" meant; and he rejected the second branch as interfering with parental duty. Clearly the Court is not astute to give effect to such conditions, and perhaps there will come a time when a condition based on religious intolerance will as such be void. But conformity to the Church might raise interesting questions as to nonconformity and dissent, which we believe are essentially different.—*L.J., 1936, p. 21.*

Self Criticism on the Bench.—At Oklahoma City recently, a Judge, who had in the course of the trial of four men charged with defrauding the Government, made some caustic criticisms of administrative orders issued in Washingtom, thought better of it and ordered a new trial on the ground that his remarks could have

been highly prejudicial either to the proseoution or the defence. Few judges are quite so frank about their errors, but Blackburn, J., once went further when, in trying a case in which the plaintiff's counsel claimed that his client's career had been blighted by the loss of an eye, he had interrupted, saying "I have lost the sight of an eye, and it has not blighted my career." The jury awarded trifling damages, and the judge blaming himself, sent the plaintiff a cheque for £50. There was once a learned serjeant who, having decided a case as commissioner of assize, afterwards moved as counsel for new trial on the ground of misdirection.—*S.J., 1936, p. 570.*

The Week's Personality.—Few lives in the law have spanned such a period as Lord Halsbury's, whose days stretched back from Lord Birkenhead to Lord Eldon, from Lord Trevethin to Lord Tenterden. His upbringing had been unusual for he never went to school but he received from his father at home an education so complete that he could throughout his life read the Latin and Greek classics for pleasure. He also gained some knowledge of Hebrew. At Oxford where he took his degree he rowed in his college eight, and after coming down he assisted his father in the work of editing a paper. In 1850, in his twenty-seventh year he was called to the Bar at the Inner Temple, embarking on that career which led him thrice to the Woolsack, where with short intervals he presided for the greater part of twenty years, and where he immediately proved himself to be *primus inter pares.* Extreme old age still found him active and vigorous, and it was only in 1916, that he delivered his last judgment in the House of Lords. Well might his successor, Lord Birkenhead, in conveying to him the profession's congratulations on the seventieth anniversary of his call to the Bar, apply to him Homer's tribute to Nestor: "Two generations of mortal men already had he seen perish that had been of old time born and nurtured with him in goodly pylos, and he was King of the third."—*S.J., 1936, p. 701.*

Calling the Spirits.—In a King's Bench case towards the end of last term the dispute concerned the origin and authenticity of certain ancient Indian miniatures, a question so obscure that Greaves-Lord, J., suggested that the only way of getting at the truth was to call the spirits. "You may call them," said counsel, "but whether they will come is another matter." That recalls a certain murder case at Warwick when the defence, as a last resort suggested that the crime had been committed by an apparition. Said the judge to the jury: "I think, gentlemen, you seem inclined to lay more stress upon an apparition than it will bear. I cannot say I give much credit to those kind of stories; but be that as it will, we have no right to follow our own private opinion here. We are now in a Court of law, and must determine to it; and I know not of any law now in being which will admit the testimony of an

apparition; nor yet if it did, doth the ghost appear to give evidence. Crier, call the ghost." The crier called thrice but to no purpose.—*S.J., 1936, p. 701.*

The A.-G.; Also the Microphone.—Sir Donald Somerville as Attorney-General and head, or leader, of the Bar, took the opportunity of endeavouring to eradicate from the public mind the low opinion sometimes entertained of advocates and also to give a word of advice to the Bar.

The Law Officer's opinion was: (1) that the Bar does not spend its time trying to bamboozle juries; (2) that the Bar does not attempt the impossible task of seeking to influence His Majesty's Judges against their better judgment. He did not say that some of them do attempt to influence H.M. Judges against what they apprehend might otherwise be their bad judgment. To the Bar the youthful A.—G. said: Fairness first, the proper exposition of facts and arguments combined with brevity. The A.-G.'s eye, as he uttered these words, seemed to rest here and there as he recognized some learned friends in the distinguished company.

To return to the impending reforms. We see the shorthand-writer on the horizon; but where is the microphone? In the Annual Statement of the Bar Council for 1931 it is recorded that in the early part of the year the Council "made efforts to procure the experimental installation of microphones in the Law Courts for the better hearing of witnesses (no mention of Judges); that the Marconiphone Company gave the benefit of a long, free trial of its apparatus in the President's Court (Lord Merrivale); that reports on its usefulness were very favourable; but the necessity for curtailing expenditure having arisen, the Council considered the time inopportune to press the merits of the innovation.

That was the year of the Great Depression; this is the year of Boom, the year (the Council may think) of opportunity. *L.J., 1936, p. 337.*

Lawyers, Clients and the Occult.—I could produce (but will not) the names of lawyers, including Judges, who believe in occult phenomena and others who profess to have an open mind in regard to the allegations of the psychic people. I do not say that they believe in talking mongeese (if this is the plural); but they regard as true things which in a Court of Law would be regarded as incredible. And there is no doubt that in the popular opinion belief in such matters is regarded as a symptom of craziness or abnormality. One feels (without making any assertion on the point) that if Mr. Lambert did believe in talking mongeese, and that if Sir Patrick Hastings conducted the plaintiff's case on that footing, his success would perhaps have been less certain.

It might be argued that the occult in law is dangerous and uncertain stuff. Some years ago (for example) a woman plaintiff rejected the strong advice of her lawyers to accept a substantial sum offered by the defendants in settlement of the action. Her reason was that she had attended at seances at which a dead Lord Chancellor appeared, telling her not to settle, but to fight; and that she would obtain very heavy damages. Unconscious of the late L.C.'s opinion, Avory, J., heard the case, and on the merits gave judgment for the defendants.

Counsel and solicitors for the plaintiff were not unnaturally conscious of the ill-effects of the psychic (or it may be the pseudo-psychic) in that case.—*L.J., 1936, p. 338.*

The Russell Rule Again.—Since 1924, when it was propounded, there has been speculation as to whether the rule in *Russell* v. *Russell,* (1924) A.C. 687 is applicable to evidence in nullity suits. The question has now been decided by Mr. Justice Langton in *Farnham* v. *Farnham otherwise Daniels* (1936) 3 All. E.R. 776. *Russell* v. *Russell* lays down that neither spouse may give evidence in a matrimonial cause or proceeding to show that he or she did not have marital intercourse if such evidence would tend to bastardise a child *prima facie* born in wedlock. But the application of the rule has been considerably limited by a series of cases. To that series the decision in *Farnham* v. *Farnham* is an important addition. The parties went through a ceremony of marriage in 1933, and the respondent (the *de facto* wife) left the petitioner a few months later. In 1935 the respondent gave birth to a child. The *de facto* husband brought a suit for nullity, alleging that the marriage had not been consummated, and that the respondent was incapable of consummating it. At the hearing the question arose whether the petitioner's evidence of non-consummation was admissible, as the possible result would be the bastardisation of the child. Mr. Justice Langton, holding that this evidence was admissible, quoted the dicta of Lords Finlay and Dunedin in the *Russell* case as showing plainly the intention of the majority that the rule should not prejudice the parties to nullity suits. Furthermore, the *Poulett Peerage case* (1903), A.C. 395 appears to have established an exception to the rule in order "to allow a man to assert his own virtue". "If exceptions to the *Russell* rule are to be admitted". said Mr. Justice Langton, "this case would surely appear to be *a fortiori* to the exceptions allowed in the *Poulett Peerage case*".—*L.J., 1936, p. 399.*

A Happy Ending.—It it not often that the President, sitting in the Divorce Court, has the pleasant experience which occurred to him this week (*Times,* December, 8). A husband who had been the respondent in a divorce suit in which a decree *nisi* had been granted

to his wife, came before him in person with a motion to rescind the decree. The petitioning wife appeared by counsel to consent to the application, and was able to assure the learned President that the King's Proctor had heard of what was to be done, and had raised no objection. The President's only difficulty was that the application was made by the respondent—by the "guilty party"—if it is not invidious to use that term when the past has been happily wiped out. In 1921 a petitioning wife moved that a decree *nisi* granted to her might be rescinded, while her husband vigorously opposed and applied to have it made absolute (*Rutter* v. *Rutter* (No. 2) 1921, p. 421. In that case Sir Henry Duke (as he then was) dismissed the husband's application on the ground that, as he was the guilty party, he could have no relief; and declared that that rule was a settled rule of the division. On the other hand, the learned President said in that case, and on good authority, that a decree *nisi* may be rescinded at the instance of the spouse who obtained it. We do not know why in the last case the lady did not move for rescission, but left it to her husband to do so. The course taken was no doubt more consonant with the rules of chivalry than with those of the Divorce Court. However, as there was nobody to oppose, the President gladly rescinded the decree with the consent of everybody concerned. For him this must have been a novel and happy experience.—*L.J., 1936, p. 399.*

Our Unknown Judges.—Of such melancholy experiences perhaps the least was the failure to distinguish the Law Lord from the County Court species. For it is the sad truth that owing to the absence of press portraits and other caricatures, the features of our greatest Judges are unknown to the general public. The intelligent and the psychic may recognise the judicial face, but by what external marks they distinguish High from County Court, Law Lord from Metropolitan Magistrate? So often the County Court Judge is sartorially superior; and if in identification parade they were submitted for detection on a view of heads alone, or of the whole persons in bathing costumes, the task would prove insuperable.

Hawke, J., once acclaimed as the handsomest man at the Bar, and now highly placed in the judicial heirarchy, told some good stories in a capital speech; and Mr. Norman Birkett was happy and at ease in proposing the toast of The Ladies. At the close Mr. S.H. Vere had little time, but he said much in few words and the President had reason to be pleased with the toast and the enthusiasm with which it was received.

Mr. Gavin Simonds, K.C., found himself in the happy position of being able to tell the Judges what he thought of them without fear of interruption or imprisonment, and he made good use of his advantage, to the great joy of the listeners; but he concluded with

serious praise, and it was a good point he made in observing that their surpassing excellence was due to the fact that they were "untrained", that is to say, that their judicial qualifications were largely due to the experience and knowledge obtained during their practice at the Bar, and not as persons practising the art of judgeship from their youth up.—*L.J., 1936, p. 411.*

First C. J. of India.—Sir Maurice Gwyer, K.C.B., K.C.S.I., K.C., has, with the approval of the King, been appointed the first Chief Justice of India in the Federal Court, and although the appointment will not take effect until October 1, 1937, he will have preliminary work in plenty before the arrival of the appointed day. It is also announced that Mr. L. A. J. Granville Ram, C.B., is to act as First Parliamentary Counsel during Sir Maurice's visit to India, and that when the appointment as C.J., takes effect, Mr. Ram will receive the full appointment. Sir Maurice Gwyer was King's Proctor and Treasury Solicitor from 1926 to 1933, and in the latter year was appointed First Parliamentary Counsel to the Treasury. He will be 59 next year, so that if he retires at the age limit of 65 he can look forward to no more than six years' tenure of the Chief Justiceship.

It is 33 years since he was called to the Bar at the Inner Temple; and he took silk in 1930. He was legal adviser successively to the Insurance Commissioners, the Ministry of Shipping, and the Ministry of Health before his appointment as King's Proctor and Treasury Solicitor in 1926.—*L.J., 1936, p. 416.*

A Good Appointment.—The news of Sir Maurice's appointment was received with general satisfaction in India, where his work for the new Constitution and the drafting of Acts and Orders is known and appreciated. This knowledge will, it is said, "qualify him peculiarly for an office in which it will be his duty to interpret the Constitution and deliver judgment in disputes between the Federal Courts."

His most notable contribution to legal literature was as editor of the 12th, 13th, 14th, 15th and 16th editions of *Anson's Law and Custom of the Constitution.*—*L.J., 1936, p. 416.*

Insanity.—The Court of Criminal Appeal have once again had to declare the law as to the defence of insanity in criminal cases. Nothing has been done in the last century to improve on the statement of the law as laid down in *MacNaughten's case* (4 St. Tr. 847). Some men of science and some lawyers have thought fit to recommend a change which should take note of the development of scientific theory or knowledge; yet the law remains as it was. Three essential points, the last of which was stated in an alter-

native form, must be establishment: a defect of reason; the existence of a disease of the mind which causes that defect; and the result that the prisoner at the material time either did not know the nature and quality of the act which he committed, or, if he did, did not know that what he was doing was wrong. There may, in times past, have been some doubt as to where *onus probandi* lay in the cases of prisoners who allege insanity; but subsequent decisions have made it clear that the burden of proof of the matter is on the prisoner. This is a rare exception to the general rule that, in all criminal cases, the Crown must prove. The only question really in issue this week (*Times*, December, 15) was whether, when no medical or other positive evidence of insanity is tendered for the prisoner, but the jury are asked to infer insanity from the whole story, it is proper for the Judge to rule that there is no evidence to support a verdict of "Guilty but insane". This had been done at York Assizes; and the Court of Criminal Appeal approved the course taken.—*L.J., 1936, p. 417.*

The Law of Evidence.—It is not always easy to discern whether a question in cross-examination merely goes to a witness's credit or if, whilst discrediting the witness, it does not also have a direct bearing on the issues in the case. This distinction may often be of considerable practical importance for if the question only goes to credit and the witness denies what is put to him, unless the question be as to a previous conviction or an alleged statement contrary to his present testimony, the witness's answer cannot be contradicted. Whether the witness or persons associated with him are actuated by feelings of hostility to the accused has usually been regarded not merely as affecting the witness's credit but as a material circumstance in the case. The decisions, however, are not uniform, but the question has been set at rest by a ruling of the Court of Criminal Appeal, in *Rex* v. *Phillips,* on November, 30. In that case, which was tried at the recent Chester Assizes, two children, who had given evidence against their father in respect of alleged offences by him against them, were asked whether they had not told some persons that the evidence they would give was what their mother had told them to say. They both denied this accusation, and witnesses where tendered by the defence to refute their denial and prove that their mother was at enmity with the accused. The trial judge rejected this evidence and a conviction followed. The Court of Criminal Appeal have now quashed this on the ground that the question whether the children were speaking from their own knowledge or were acting under their mother's direction was a material issue—a decision which, we may respectfully say, accords as well with the balance of authority as with the dictates of justice.—*L.J., 1936, p. 417.*

An Amazing Month.—This amazing month of December is little more than half spent, and His Majesty's liege subjects are too exhausted in spirit for any further examples of the unprecedented. It is hoped that what is left of this wintry month will hold nothing more abnormal than Christmas, and that some longer space of comparative peace may be vouchsafed so that we may truly adjust ourselves to the irrevocable things which so surprisingly and unexpectedly have come to pass. The King of last week is not the King of to-day, though the former King is still alive.

Despite bewilderment, however, all men are conscious of one gratifying fact: that they and the British Commonwealth stand on the solid ground of undivided allegiance. As an Archbishop truthfully observed on an ill-omened occasion, although within 24 hours one King went and another King came, there has been "no confusion, no strife, no clash of parties." And it is also abundantly manifest that when the change became inevitable the fact that it occurred without strife or division, and without risk or danger to the State, the Empire and the Throne, was due above all others to the conduct and behaviour of one man, that is to say, of him who last week was King Edward VIII and is now His Royal Highness the Duke of Windsor.

Such acknowledgment of truth implies no disparagement of the patriotic services of those who helped to bring us to the place wherein, with one heart and voice, we say: God Save the King.—*L.J., 1936, p. 427.*

The King's "Cousin".—To the lawyer (or lawyers) responsible for the application of the word "demise", in the Abdication Act, to this unprecedented transfer of the Crown, the thanks of the nation and Empire are due; for if the change were not regarded as a "demise" we should still be in the midst of troubles, possibly not the least of them a General Election. When prizes are distributed, the astute lawyer or lawyers must not be forgotten.

Laymen who have been reading with avidity all writings relating to the Abdication were some of them misled by the terminology of the Commission, "signed by the King's own hand," giving the Royal Assent to the Bill, into the belief and confident assertion that Vizcount Hailsham is a near relative of King Edward VIII. "For is it not written", they said, "as follows . . . 'Willing this the said Act shall be of the same strength force and effect as if we had been personally present in the said Higher House and had publicly and in the presence of you all assembled and the same Commanding also our most dear Cousin and Counsellor Douglas McGarel Viscount Hailsham Chancellor of Great Britain to seal these Our Letters Patent with Our Great Seal of Our Realm" thereafter referring to the Dukes of York and

Gloucester as "Our most dear and entirely beloved Brothers"—as they are in fact.—*L.J., 1936, p. 427.*

Blackstone Explains.—The tie between the King and the Lord Chancellor is not indeed one of blood and kinship, and as appearing in royal writs and commissions the cousinly word is customarily used by the Sovereign as an expression of friendly relationship with a nobleman. It is "used by a Sovereign in addressing or formally naming another Sovereign, or a nobleman of the same country".

In Blackstone's commentaries (I, 386) it is said: "In all writs, and commissions . . . . the King, when he mentions any peer of the degree of an earl, always styles him 'trusty and well-beloved cousin'; an appellation as ancient as the reign of Henry IV; who being either by his wife, his mother or his sisters actually related or allied to every earl in the Kingdom, artfully . . . acknowledged that connexion in all his letters".

From which it would appear that its first use was in accordance with the fact of a kinship, not so remote that the name of "cousin" would be inapt or inaccurate.

It is curious that apart from the acknowledgement of spiritual paternity, the formal mention of the Archbishop in Commissions contains no expression of endearment and the references in the latest Commission to "The Most Reverend Father in God and Our faithful Counsellor Cosmo Gordon, Archbishop of All England and Metropolitan", is not exceptional.—*L.J., 1936, p. 427.*

The Statutes of Limitation Report.—The Law Revision Committee have issued their Fifth Interim Report. They have several matters under reference, but the present report deals with the Statutes of Limitation. These have come into existence gradually and have been from time to time amended, but they have never before been considered as a whole. The predominant statute for simple contract and tort is the statute of James, the Limitation Act, 1623, under which the general period of limitation is six years; for speciality debts, the Civil Procedure Act, 1833, with a limitation of twenty years; and for actions to recover land, the Real Property Limitation Acts, 1833 and 1874, the limitation being twelve years. The varying periods of limitation have in some cases caused confusion, especially the twelve years for money charged on land under the 1874 Act, S. 8, and the twenty years for a speciality debt under S. 3 of the Civil Procedure Act, 1833, and the Committee recommend that the latter period should be reduced to 12 years, so as to have the same period in each case. The law as to stopping the running of the statute by acknowledgment is also in a confusing state. The Committee recommend various simplifications, and also that an acknowledgment of a

simple contract debt should not rest upon the judge-made rule that it must operate as a promise to pay, but that, as in other cases, the acknowledgment as such should stop the statute. This would clear off a host of difficult decisions. There are special periods of limitation under particular statutes. The most important is the six months under the Public Authorities Protection Act, 1893. We are glad to see that the Committee recommend an extension of this to twelve months. There is very much else in this very careful and interesting report, and we hope to deal with it more fully at an early date.—*L.J., 1937, p. 1.*

BOOK REVIEWS

INDIAN COMPANIES ACT: by Susil Chandra Sen, M.SC., B.L., Published by the Book Co., Ltd., Calcutta. Price Rs. 3-8-0.

This is quite a welcome publication. The Indian Companies Amending Act (XXII of 1936) would by itself have been of little assistance and will have to be read at all stages with the main Act. To enable the lawyer as well as the layman to know at a glance the law as amended, a book like the one under review was quite necessary and it was but proper that Mr. Sen a lawyer with experience of the working of the Company Law and who in fact fashioned out the present changes—should have undertaken to bring out such a volume.

Mr. Sen has given us the text incorporating all the amendments and at the end of each section has furnished us with notes indicating the alterations made. He has also provided us with an admirable synopsis indicating the changes made in regard to public companies.

The book is bound to be of great assistance to the public, and the Book Company Ltd., deserves our congratulations for the neat get up of the volume.

ELECTION CASES, INDIA & BURMA, 1920-1935. By Sir Lawrie Hammond, K.C.S.I., C.B.E., Published by Butterworth & Co. (India) Ltd. Rs. 15.

There is no doubt whatever about the need for a report of cases relating to disputed elections to the Central and Local Legislative Councils; and if practitioners and election authorities have had to wait long for such a book it is pleasant to be able to give a hearty welcome to it now that it has been edited by one whose name is a sufficient guarantee of careful selection and substantial accuracy. And the Editor's desire to associate with the volume the names of Sir M. Venkatasubba Rao of the Madras High Court and Mr. Din Muhammed of the Punjab High Court, his colleagues on the Indian Delimitation Committee, is not only reminiscent of a very happy family, but also indicates that the book is the result of

an actual investigation of the several problems that confront election tribunals in this country. The cases, which are nearly one hundred in number, are stated alphabetically according to the constituency for which the election was contested. The points decided in each case are stated at the beginning of the report and the subsequent changes in law, if any, have also been indicated. Thus in reporting Case No. XXIV, *Bombay City North* at page 186 the Editor points out that under The Corrupt Practices Order of 1936 after an election is set aside the candidate who got the next largest number of votes cannot be declared elected unless there be proof that he received a majority of the valid votes or would have done so but for the votes obtained by the returned candidate by corrupt practices. The Indian Election Cases, though on several points they follow and overlap decisions in England, sometimes cover special grounds. Thus it is very interesting to read the large number of cases dealing with undue influence by spiritual intimidation. The selection and the general arrangement of the matter does credit to the author and the book will undoubtedly be most useful to election tribunals functioning under the New Reforms. The book contains in the form of Appendices The Corrupt Practices and Election Petitions Order of 1936 and the leading English case of *Woodward* v. *Sarsons.* It is hoped that the publishers of this excellent book would publish periodically reports of cases on the same lines as in this volume so that their work will be kept up-to-date.

MANUAL OF THE LAW OF ELECTIONS IN BRITISH INDIA by N. G. Nadkarni, 1937. Published by N. M. Tripathi & Co., Bombay. Price Rs. 4-8-0.

Now that the elections under the new Government of India Act are absorbing the attention of the candidates, this book has appeared in the right time. It is necessary that all those who have to do with elections, whether it be as a Polling Officer or Returning officer or candidate or the petitioner or respondent in an election petition, must have a clear idea of the law on the subject. The learned author who has considerable experience in all the important election cases in the Bombay Presidency has brought out this book on the subject in lucid language yet with commendable brevity. The learned author has combined in this work the rare virtues of precision and conciseness. All aspects of the law have been dealt with and the important decisions have been referred to, to illustrate the various points. The book is divided into eleven chapters and all questions that are likely to arise in connection with the elections have been considered in their natural order. We have no doubt that the book will be found very useful to all persons having to do with elections in whatever capacity it may be.

TRIAL BY JURY IN BRITISH INDIA by M. Krishnamachariar, M.A., M.L., PH.D., assisted by M. Srinivasachariar, B.A., B.L., 1937. Published by V. S. N. Chari & Co., Nungambakam, Madras. Price Rs. 6.

This is another book from the pen of Dr. Krishnamachariar who is already familiar to the members of the legal profession by his books on legal subjects. In this book, he deals with the trial by jury in British India. The book under review is an exposition of the law and practice of Criminal trials with the aid of jury and assessors in courts of Sessions and the High Courts of British India. The law on the subject is mostly contained in the Criminal Procedure Code and the decisions under it. The learned author has dealt with the subject in the course of eighteen chapters and no aspect of the subject has been omitted. The rules framed in the various provinces have been given wherever necessary. References to all the decisions bearing upon the subject have been given in their appropriate places. The appendices which are six in number give the relevant provisions of the Criminal Procedure Code, extracts of the Medical Jurisprudence and other useful allied information. There is an exceedingly interesting and instructive foreword to the book by Mr. Justice Wadsworth on the history of the jury system which no reader should pass over. It discloses a great deal of research and gives information which is not easily available elsewhere.

THE LAW RELATING TO RELIEF AND PROTECTION OF DEBTORS by K.V. Ramasubrahmaniam, B.A., B.L., Madura, 1937. Published by The Law Publishing Co., Mylapore, 1937. Price Rs. 3.

This book in the main is a commentary on the Usurious Loans Act, the Madras Debtors Protection Act and the Madras Debt Conciliation Act. The last two are the recent attempts by the Madras legislature intended to tackle the question of indebtedness. In view of the fact that these enactments are very recent, there can be no growth of case-law under them. The appendices give the provisions of the English Money Lenders Acts of 1900 and 1927, the English Pawnbrokers Act of 1872, the Agriculturists Loans Act, the Bengal Moneylenders Act of 1933, the Central Provinces Debt Conciliation Act of 1933, the Central Provinces Moneylenders Act of 1934 and other allied enactments. The learned author seems to think that the recent Madras enactments do not go far enough. In thinking so, we are not sure whether he has realised the full consequences of such legislation going too far. Already as a result partly of creditors being unable to realise their dues from the debtors private credit is beginning to be restricted considerably and capital is going into Banks and other financial and industrial institutions where there is a security for the monies invested. If such enactments are widened in their scope, there is a real danger in the remedy being worse than the disease and private

credit being further restricted which is not what the author has in view. We are inclined to think that the correct note has been sounded by Mr. Justice Wadsworth in his foreword to the book.

THE NEGOTIABLE INSTRUMENTS ACT, SIXTH EDITION, by J. S. Khergamwala, LL.D., (Lond.) B.A., LL.M., (Bom.) 1936. Price Rs. 4.

This is a book mainly intended for students and is not without its use even for practitioners. The notes under the sections are clear and the leading decisions are referred to though learned discussions on abstruse points are avoided. We have every hope that the book will be found useful by those for whom it is intended.

THE INDIAN COMPANIES ACT 1913 by Nrisinhadas Basu, B.L., Advocate, 1937. Eastern Law House, Calcutta. Price Rs. 4.

The Indian Companies (Amendment) Act of 1936 has introduced a number of important changes on the pre-existing law and the new Act came into force on the 15th of January, 1937. A commentary like the one under review which gives the new sections in their places among the provisions of the original Act will be welcomed by the businessman who has to observe the new provisions and bring himself and the company in line with them. To the lawyer, the book is useful as it gives the commentaries giving references to the important decisions under the original Act and noticing the changes introduced by the Amending Act. The leading English decisions have been referred to in their appropriate places. We are sure that the book will be found useful and it has appeared at the proper time.

CRIMINAL RULINGS OF THE ALLAHABAD HIGH COURT 1904-1934 VOLUMES I AND II, published by the Allahabad Law Journal Press, Allahabad, 1936. Price Rs. 24.

There are a large class of legal practitioners who devote themselves mainly, if not solely, to the practice in the Criminal Courts. To them a publication like this, will be found of special value as they will not have to spend money for the costly volumes of all the law reports which are mostly taken up with Civil cases. This book supplies the want so far as the Allahabad High Court decisions are concerned between the years 1904 and 1934. If similar publications appear for the other superior courts and for the other years, the Criminal Court practitioner will be saved the trouble of subscribing for the general law reports in these times of depression.

We are in receipt of the Monthly Journal of the Punjab and Frontier Revenue Rulings and Acts Volume I, Part I, edited by Malik Mohammad Aslam Khan M.A., (Cantab.) Lahore.

THE
MADRAS LAW JOURNAL

1937] [I

THE METHODS OF BRITISH JUDICIAL INTERPRETATION OF HINDU LAW SOURCES.

BY

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II

In the beginning of the British administration of Hindu Law, there were two divergent theories about the nature of Hindu Law among the European scholars and administrators, one adumbrated by the European scholars residing in the Madras Presidency with the notable exception of Sir Thomas Strange and the other put forward by those connected with the Bengal Courts. The former was, as Sir Henry Maine put it, that:

> "Indian law may in fact be affirmed to consist of a very great number of local bodies of usage and of one set of customs reduced to writing pretending to a diviner authority than the rest, exercising consequently a great influence over them and tending, if not checked, to absorb them".

Mr. J. D. Mayne in his "Hindu Law and Usage" referring to this theory states that it must not be understood that these bodies of custom were fundamentally distinct, but that they were marked by the same general features, though there were considerable differences of detail. Mr. Nelson, a Madras civilian, who was the author of the Madura Manual and a book called 'The View of Hindu Law' went to the extent of even observing:

> "Has any such thing as Hindu law at any time existed in the world or is it that Hindu law is a mere phantom of the brain imagined by Sanskritists without law and lawyers without Sanskrit?"

Mr. Ellis and Dr. Burnell were also of the same view. Mr. Ellis says that:

> "The law of the Smritis, unless under various modifications, has never been the law of the Tamil and cognate nations".

In this view there is no such thing as Hindu law as known to jurisprudence but all the rules of so-called Hindu law are in the nature of usages actually followed by the people, and the Smritis, commentaries and digests form the material sources of Hindu law only in the sense that they are the records of such usages prevalent in the various periods in which these works were written. This theory receives some support from Lord Dunedin who makes the following observations in the judgment of the Board in *Balwant Rao* v. *Baji Rao*[1]:

"It must always be remembered that the commentaries are only commentaries. They do not enact; they explain, and are evidence of the congeries of customs which form the law".

The other theory advocated by scholars and judges like Sir William Jones, Mr. H. T. Colebrooke, Mr. Macnaughten, Mr. Sutherland and Sir Thomas Strange was that there was in India a system of law containing its own principles of exposition which was of general application to the Hindus throughout the country and that it was established and enunciated by well-known Hindu sages and jurists who flourished in ancient India and had also been developed throughout the centuries by a succession of able lawyers, and though it may be granted that the system may be modified in its application by the usages of localities, of families or tribes and of certain guilds or caste corporations, still there are entire bodies of general rules which may well form the civil law of the country. Mr. Mayne in his "Hindu Law and Usage" was of the intermediate view that the Hindu law was only a body of usages which are not of general application and that there were many people who had other distinct usages like the Dravidians, the Nairs of Malabar and the people of South Kanara but that still, there were general features in the whole body of usages which may justify us in calling it 'Hindu Law and Usages'. Further, another notion which militates against Hindu law being regarded as the civil law of the country is the view which found expression in two decisions of the Judicial Committee that the Hindu law was a mixture of morality, religion and law. Lord Hobhouse in *Rao Balwant Singh* v. *Rani Kishori*[2] observes:

"All these old text-books and commentaries are apt to mingle religious and moral considerations, not being positive law with rules intended for positive law".

1. (1920) 39 M.L.J. 166: L. R. 47 I.A. 213: I.L.R. 48 Cal. 30 (P.C.).
2. (1898) L.R. 25 I.A. 54 at 69: I.L.R. 20 All. 267 (P.C.).

In *Radha Mohun* v. *Hardai Bibi*[1] Lord Hobhouse again observes:

> "They now add that the further study of the subject necessary for the decision of these appeals has still more impressed them with the necessity of great caution in interpreting books of mixed religion, morality and law, lest foreign lawyers accustomed to treat as law what they find in authoritative books and to administer a fixed legal system should too hastily take for strict law precepts which are meant to appeal to the moral sense".

It is necessary therefore to discuss and determine whether it can be generally taken that the rules of the Hindu law books will, according to the well-known legal notions, be said to be the civil law of the Hindus. One test to find out whether a set of rules constitutes a legal system and can be called law, is that it should consist of rules recognised and acted on by Courts of Justice. Salmond in his "Jurisprudence" says:

> "All law is not made by the Legislature. In England most of it is made by the law Courts".

So far as we could see, it is impossible to say that, in ancient times, legislation as it is known to us nowadays was the source of Hindu law. But it can be said with a great degree of justification that, in ancient India, the rules as found in the Smritis, aided by the interpretation of the commentaries were recognised and administered as law by the kings and their Courts of Justice. The reference to Rajasāsana as one of the four constituent elements of law sources by Brihaspati, Kātyayana and Nārada, who go to the extent of asserting the supremacy of Rājasāsana above the others and by Kautilya in his Arthasastra, may not imply fully what all is understood nowadays by legislation. But a careful reading of the Smritis, especially of Manu, Yajnavalkya, Nārada, Brihaspati and Kātyayana, will convince us of the existence in ancient India of Courts of law and of a regular system of judicial administration, both civil and criminal. Modern research, especially after the discovery and publication of Kautilya's Arthasastra which gives us an account of the actual methods of administration of one of the extensive empires in India, *viz.*, the Magadha empire, under the rule of Chandragupta Maurya, confirms the above statement. One may be fairly certain that the rules contained in the Smritis were, in ancient India, applied in the actual decision of cases by the King's Courts and the other subordinate Courts of the land. The very

1. (1899) 9 M.L.J. 67: I.R. 26 I.A. 113 at 136: I.L.R. 22 Mad, 398 (P.C.).

definition of 'Vyavaharapada' or a judicial proceeding, given by Yagnavalkya in his Smriti clearly shows that the Smritis were regarded as law Codes, and that the complaint before the king related to the infringement of a rule of law (*vide* the Chapter on Vyavaharamatrika, verse 5, Yajnavalkyasmriti). The more ancient Manusmriti also (Ch. VIII, verses 3 to 8) gives a list of the eighteen titles of the law, such as non-payment of debts, deposit and pledge, etc., and states that the decision of cases should be according to the principles drawn from the Dharmasastra. The mention of the Smriti as distinct from Achara, *i.e.*, custom or practice and charitra or record of usage itself is a clear indication that the rules contained in the Smritis in respect of Vyavahara are regarded as rules of law and not as mere usages and the provision that cases coming before the king or the Judges should be decided according to the rules of the Smriti confirms the view that the portion of the Smritis relating to Vyavahara contains rules of law. In the commentary by Visvarupa on verse 2 of the Vyavaharamatrikadhyaya of Yajnavalkyasmriti it is stated that the chief authority for the decision of cases is the Dharmasastra or the Smriti. In Kātyayana Smrithi quoted by Smritichandrika it is clearly defined that Vyavahara is decision of cases according to Smriti Sastra or rule. It is, therefore, provided in the Smritis that the king should have the assistance of persons learned in the Dharmasastras who are referred to as Sabhasad as "those who sit in Court."

From the foregoing it is clear that we must regard a Smriti or generally Dharmasastra especially in regard to the decision of cases as a Civil Code which has been written by eminent law-givers, consisting of rules to be followed by courts in the actual decision of cases. That these are rules of law to be followed in the decision of cases is further confirmed by the direction contained in the Yajnavalkyasmriti, chapter on Sadharanasadharana Vyavahara verse 11. "Where there are two apparently conflicting rules of law, the well-known canons of interpretation ought to be followed in the application of the law for the decision of the case." This resembles the modern practice of the interpretation of the rules of a statute, when the statute is applied to the decision of a case. Viewed from this aspect, *viz.*, that the rules of the Smritis were, as a matter of fact in ancient India, enforced by the courts of law in the actual decision of cases which came up before the Courts, the

phenomenon of the existence of many smritis by various law-givers belonging to different periods in the history of India and to different provinces within India stands explained. Just as we find in modern times even when law is uniform and certain on account of the existence of a central legislature which establishes the law for the whole country, still on account of the judge-made law of the various High Courts there is, as it were, a variation in the law of the various provinces, similarly, one could imagine that the various Smritis came into existence, not only on account of the changes of time and but also on account of the different interpretations of the law in the localities in which the Smritis were applied in the decision of cases. This view receives some confirmation, if we look at the learned discussion by Kumarila Bhatta as regards the authority of Smritis. He recognises that the authority of some Smritis is limited on account of the existence of differing Vedic schools in the country. This indicates the probability of the existence of differences that arise by reason of the interpretation and application of the law in the decisions that come up before the courts of the various localities in India.

Hence the theory that all the commentaries are mere 'congeries of customs' according to Lord Dunedin's famous dictum, cannot stand. The sharp distinction that we find in the Smritis between Smriti proper and acharas, implying usages recognised by the Smritis, *viz.*, the usages of a locality, of a tribe or family and of a caste corporation or trade guild only and the specific definition in the Smritis themselves of a judicial proceeding to be in respect of a violation of the rule of the Smritis and the direction in the Smritis to the King's Courts to apply these rules to the decision of cases, all these point to the fact that the Smritis were Codes of law which were enforced by the kings of ancient India as the civil law of the country. It may not be correct to call the Manusmriti for instance as a statute or a piece of legislation. But it corresponds to something like the Institutes of Justinian or other codified law of ancient times in other countries.

The whole chapter on civil procedure in the Smritis cannot also with any propriety be called usage.

It will not also be right to affirm generally, as has been done by the Judicial Committee, that the Smritis and commenaries are a mixture of religion and law. Though the Smritis

treat of what is called Dharma, a word which may apply to religious and moral duties also and hence, the Smritis contain religious, moral and social injunctions, also, the Smriti-writers have clearly perceived the distinction between civil law and religious and moral duties. Many of the Smritis devote separate chapters to Vyavahara. There are some Smritis which deal only with Vyavahara. Further, the discussion in the Mitakshara as to whether ownership is of a spiritual nature or temporal, and its final conclusion that the conception of ownership has nothing to do with religion, but belongs to the domain of civil law sets at rest all doubts as to whether the Smritis knew of the distinction between religious and moral injunctions on the one hand and civil law on the other. The moral and religious injunctions in regard to certain kinds of acquisition of property, the Mitakshara says, can have no bearing on the question of a person'sownership of the property and inheritance by his sons. There is also the clear affirmation by the Mitakshara in its commentary on sloka 118 and 119 of Yajnavalkya on impartibility of self-acquisitions, that the chapter on Dayavibhaga or partition of heritage contains mostly enunciation of matters of a civil nature in contradistinction to religious or spiritual matters, *i.e.*, Loka Siddhānuvada and not Sastra Siddha. The historical phenomenon that many portions of the law of Manu are followed by the Buddhists, and that the Burmese law corresponds in many particulars with the laws of Manu shows that civil law must have had a distinctive existence in the consciousness of the people. In fact so powerful and distinctive has been the influence of the laws of Manu on the people in ancient India that Manu's Code has travelled even to Java and Bali. An inscription of the 14th century A.D. in Bali known as Bendasari Inscription gives an account of a judgment in a civil case and describes the way in which the judges came to a decision. There were six judges who were referred to as Dharma Pravakta and Vyavahara Vicchedaka. They took into consideration the law as enunciated in legal texts, the local usages and customs, the precedents and ultimately decided in accordance with the principles enunciated in Kutara-manava, the law-book which was regarded as of highest authority in the island.[1] The prevalent notion that the source of Hindu law is the Hindu religion which finds expression even in books on jurisprudence like

1. Dr. Krishnaswami Iyengar Memorial volume, p. 447.

Holland's jurisprudence is due to the fact that in analysing the principle on which the authority of the Smriti rests, it is said that the Smritis derive their authority from the Vedas. But, in truth, the references to Vyavahara and to rules of law are very meagre in the Vedas and it would be impossible to find Vedic texts for all the rules of the Smritis. Resort is had, therefore, to a legal fiction of a lost Sruti text when we find no express texts in the Vedas corresponding to the rules of the Smritis. All this process is gone through to conform to the scientific theory of pramana as known to Hindu philosophical literature. Where, however, the rules of Vyavahara are Loka Siddhānuvada, then, the necessity for even this fiction of a Vedic rule does not arise. In reality, then, the authority of the Smritis rested mainly on their enforcement by the kings of ancient India in their Courts of law. The authority of the Smritis as based on the Vedas was also propounded in order to differentiate these Smritis from the books of the Buddhists and Jains who were also Hindus by race which also enunciated many Dharmas for the followers of the Buddhist and Jain religions. Hence we find Manu also referring to the absence of authority of the Vedabahya Smritis in Chapter XII, verse 95. In modern language it will amount to the statement that they apply to Hindus by religion. The upshot of the whole discussion in pada 1, Adhyaya 3, Adhikarana 1, 2, 3 and 4 of Jaimini's Mimamsa Sutras stated in ordinary modern phraseology is that the Smritis are authority as they emanate from law-givers who are steeped in Aryan tradition and culture. The observation of the Judicial Committee in *Sri Balusu Gurulingaswami* v. *Ramalakshmamma*[1] that the Smritis are held by orthodox Hindus to have emanated from the Deity and are looked upon as divine is not correct. The Smriti-writers are only revered as eminent sages and law-givers. They possess neither the absolute authority of the Vedan or its infallibility in spiritual matters. In fact, Sabaraswami, the commentator of Jaimini Sutra goes to the extent of rejecting the authority of the rules if they can be said to be due to any selfish or unreasonable motive.

But the notions above referred to that the Hindu Law books were "congeries of customs" and that they were a mixture of law, religion and morality have had their effect

1. (1899) 9 M.L.J. 67: L.R. 26 I.A. 113 at 131: I.L.R. 22 Mad. 398 (P.C.)

upon the judicial interpretation of the Hindu law sources and the relative importance attached by British Courts to the different sources of Hindu law. The first and foremost logical result of the assumption that the commentaries were congeries of customs is that the Judges administering Hindu law ought to strictly follow the authoritative commentaries and not the texts themselves which the commentaries elucidate. So early as *Rungama* v. *Atchama and others* and *Atchama* v. *Ramanadha*[1] it was observed by the Judicial Committee as follows:—

> "It is quite impossible for us to feel any confidence in our opinion on a subject like this, when that opinion is founded upon authorities to which we have access only through translations, and when the doctrines themselves and the reasons by which they are supported or impugned are drawn from religious traditions, ancient usages and more modern habits of the Hindus with which we cannot be familiar."

In that case the Judicial Committee was concerned with the question whether a second adoption is valid under the Hindu law when the previous adopted son is alive. In *Collector of Madura* v. *M. Ramalinga Sethupathy*[2] the Judicial Committee observe as follows:—

> "The duty of an European judge who is under the obligation to administer the Hindu law is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities as to ascertain whether it has been received by the particular school which governs the district with which he has to deal and has there been sanctioned by usage, for, under the Hindu system of law, clear proof of usage will outweigh the written text of the law."

I have already referred to how this passage was interpreted by Sir John Edge and the Judicial Committee disapproved of his interpretation in the decision in *Bhagwan Singh* v. *Bhagwan Singh*[3]. Recently again in *Atmaram Abhimanji* v. *Bajirao Janrao*[4] the Judicial Committee laid down that where there is a conflict between the Smriti and the commentary, the commentary shall prevail. There, the Board was discussing the question whether the Samanodakas beyond 14 degrees from the common ancestor were entitled to inherit. The text of Yajnavalkya referred to the Gotraja in general terms, while the Mitakshara on that text interpreted it as the Samanodakas within 14 degrees, relying on the text of Brihanmanu. The Mitakshara is preferred by their Lordships on the ground that the Mitak-

1. (1846) 4 M.I.A. 1 at 4. 2. (1868) 12 M.I.A. 397 at 436.
3. (1899) L.R. 26 I.A. 153 at 164, 165, 166: I.L.R. 21 All. 412 (P.C.),
4. (1935) 68 M.L.J. 673: L.R, 62 I.A. 139 (P.C.).

shara subordinates very often the texts to custom and approved usage, a dictum which the Board already made in *Bhyah Ram Singh* v. *Bhyah Ugur Singh*[1]. This principle, *viz.*, that the commentaries and digests are the final authority as they embody existing usage and not the ancient texts gave rise to the various schools of law, now recognised by judicial decisions applying to the different localities. In fact, these schools of law have developed into a sort of territorial law of the respective localities—all because of the doctrine of usage.

The question, therefore, that falls to be discussed, is whether according to the Smritis and commentators the paramount importance given to usage and of the binding force of all these by the sanction of usage can be considered to be sound. It is no doubt true that in the period just preceding the establishment of the British Courts there was the absence of the enforcement of the rules of Hindu law by the King and the King's Courts, as the country was largely under Mohammadan rulers who left the Hindu population to follow and administer their own laws by a system of panchayats. It, therefore, seemed to scholarly European observers of the Indians of that period that the rules of the Hindu law were of binding force only as the usages of the Hindu family. And it is on account of this that the impression was borne in upon the minds of British administrators that the rules of the Hindu law should be enforced by British Courts, for the reason that the religious and domestic usages of Hindus should not be interfered with by the Courts of a Christian Government. According to the strict theory of a commentary, it can never override the texts, but can only elucidate it. As there were many Smritis and they were all binding on the courts of law in ancient days, often enough, the full meaning of a particular text had to be brought out by a reference to other texts which dealt with the same subject-matter. And, because, as was already observed, where two texts conflict, the rule of interpretation should be followed for the purpose of applying the correct law, the commentary tries to deduce the principle by reconciling the texts. But except in the case, where, the commentary specifically refers to the usage obtaining in the country it cannot be affirmed generally that the commentary is embodying only a usage which has changed the previous usage recorded in the

1. (1870) 13 M.I.A. 373.

text itself. Just as in modern text books we have notes or commentaries which discuss the application of the rules of a statute to various circumstances, and to new situations which may not be contemplated by the letter of the rule, the commentators of Hindu law proceed on the same lines; and as in the case of modern commentaries on Statutes we cannot say they are merely recording the existing usage, so we cannot also say of the Hindu commentators. No commentator, therefore, ever purports to change or override the original text he is commenting on. He accepts the full authority and reputation of the texts. According to the Pramana theory of the Jaimini Sutras the commentary is no authority on Dharma and cannot have any binding force at all. It was because the Pandits appointed by the British Courts to advise the European Judges on the Hindu law made reference in their opinions to the commentaries, it was erroneously believed that the commentaries themselves established the rules of law to be followed. As the European Judges had not access to the original texts themselves as most of the texts were not translated and as they found ready to hand the digests, they thought that the law must be ascertained primarily from the digests. But this principle too, was never consistently adhered to. In regard to the question whether immovable property inherited by a widow from her husband who died divided without issue will be her Stridhanam property and she will have power of absolute disposition over it and whether it passes to the next heirs of her husband, although the Mitakshara would include under the definition of Stridhanam property inherited by a woman from her husband and the term Stridhanam is not confined to the six kinds of property mentioned by Manu, the Privy Council in *Thakoorain Sahiba* v. *Mohun Lall*[1] relying on the text of Kātyayana held that the widow's power of disposition over both movable and immovable properties is limited for certain purposes and, secondly, that on her death both pass to the next heir of her husband. Their Lordships observe at page 504, referring to the 11th section of the second chapter of the Mitakshara, as follows:—

"These passages and the arguments in favour of the widow's right of disposition which were deduced from them were lately under the consideration of this committee".

1. (1867) 11 M.I.A. 386.

Looking at the judgment of the Judicial Committee in *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram*[1] we find that the Judicial Committee clearly observe that the text of the Mitakshara is wholly silent as to the disabilities of the woman or the nature of the interest which she takes in her husband's estate. Reference is also made to the fact that the term Stridhana in the Mitakshara includes property which she may have acquired by inheritance from her husband and to the argument based upon it that there can be no distinction between different portions of a woman's Stridhana or separate property. The conclusion is reached, however, about the limitation of the widow's enjoyment of her husband's estate and of her power over it on the basis of the texts of Manu and Kātyayana and Nārada and upon the general theory that the Smritis entertained notions of the infirmity and necessary dependence of the female sex. The Judicial Committee placed reliance also upon previous judgments of the Board in *Beema Shunker* v. *Jamasjee Shaporjee*[2] and in *Collector of Masulipatam* v. *Venkata Narrainapah*[3]. In *Beema Shunker* v. *Jamasjee Shaporjee*[2] the Judicial Committee relied, as regards the power of the widow to dispose of the property of her husband on the opinion of the Pandits and observe that this opinion is a true exposition of the law as laid down and acted upon in former cases, *viz.*, in the same volume at p. 191, where the opinion of the Pandits was referred to. From the extract made in that case we see that the Pandits rely on the text of Kātyayana which was recited therein to be as follows:—

"That the woman who is without children, for the sake of her virtue, should remain with her father-in-law and as long as she lived apply her husband's fortune to charitable acts, and after death it devolves to her husband's heirs."

The translation of this text as given in Dr. Jha's "Hindu Law in its Sources" is as follows:—

"The sonless widow faithful to her husband's bed and living with her elders shall patiently enjoy her husband's property till her death."

In *Collector of Masulipatam* v. *Venkata Narrainapah*[3] their Lordships at p. 550 observe:

"It is clear that under the Hindn law the widow, though she takes as heir, takes a special and qualified estate. Compared with any estate that passes under English law, it is an anomalous state. It is a qualified proprie-

1. (1866) 11 M.I.A. 139 at 175.
2. (1837) 2 M.I.A. 23 at 33.
3. (1861) 8 M.I.A. 529.

torship and it is only by the principles of the Hindu law that the extent and the nature of the qualification can be determined".

The reason of the law for the fetter on the widow's power is stated to be that, "according to numberless authorities from Manu downwards, the proper state of every woman is one of tutelage, that they always require protection and are never fit for independence." These texts relating to the dependence of woman are referred to in the Mitakshara not for the purpose of deriving from them the reason for the fetter imposed on her power of disposition over her husband's estate. On the other hand, the Mitakshara points out that they have no relevancy with regard to the taking of the property by the widow. The text of Kātyayana is not quoted at all by the Mitakshara and the text of Manu on the dependence of women is only quoted to show that it has no relevancy in determining the question whether the widow is heir to her husband.

The whole question whether property inherited by a female from a male is taken by her for only a restricted estate and devolves on her death in the line of such male again came up before the Board in the case reported in *Vaduganadha Tevar* v. *Dora Singha Tevar*[1], where the nature of the estate taken by Kathamanachiar, the daughter of the Isthimrar Zamindar was decided. The Mitakshara which adds to the text of Yajnavalkya by declaring that the character of Stridhana attaches not only to the acquisitions by the woman which the text specifies as such, but also to property which she acquires by inheritance was said to be no authority for the position that the widow or daughter took an estate transmissible to her heirs. On the other hand, their Lordships observed that the point was completely covered by previous authority. They relied upon the two previous decisions of the Board already referred to, *viz.*, *J. P. Wise* v. *S. Chowdranee*[2] and *Mohummad Zahoor Ali Khan* v. *Mussamat Thakoorani Rutta Koer*[3]. They also referred to the decision in *Chotay Lall* v. *Chunno Lal*[4] where the estate of a daughter was in question. The Judicial Committee referred again to the text of the Mitakshara and to its interpretation and observed that it would be unsafe to re-open the question by giving effect to arguments founded on a different interpretation of old and obscure texts and they agreed in the observation of

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1. (1881) L.R. 8 I.A. 99: I.L.R. 3 Mad. 290 (P.C.).
2. (1867) 11 M.I.A. 178 at 191.
3. (1867) 11 M.I.A. 470 at 487.
4. (1878) L. R. 6 I.A. 15: I.L.R. 4 Cal. 744 (P.C.).

the High Court that Courts are not to unsettle a rule of inheritance affirmed by a long course of decisions, unless indeed it is manifestly opposed to law and reason. They added that the rule of a restricted estate in case of inheritance by the female from a male was not opposed to the spirit and principles of the law of the Mitakshara and that, on the contrary, it appeared to them to be in accordance with them. All these observations are not at all consistent with the principle which the Board set to themselves of applying the rule found in the commentary without discussing whether the said rule can be deduced from the earliest authorities. But the Board proceeds on the general principle of a self-contained law Code. That is why they say the rule is not opposed to the spirit and principles of the law of the Mitakshara. Nor do they seem to proceed upon the principle that a commentary like the Mitakshara is a congery of customs for one could well argue that according to the customs of the period in which the Mitakshara was written, the property inherited by a female from a male is treated as stridhana. Not content with this, the Courts have given a further extension to the rule in *Sheo Shankar Lal* v. *Debi Sahai*[1] that property which a woman inherits from a female is not her stridhanam in the sense that on her death it passes to her stridhanam heirs in the female line. In reviewing again the principles on which the rule of a restricted estate in the case of inheritance by females was established, their Lordships observe as follows:—

"Their Lordships examined the primitive texts upon which the Mitakshara purports to be based, they considered the fundamental principles of the Hindu law they reviewed the judicial decisions upon the questions bearing upon them, they gave such weight as could properly be given to the very conflicting opinions of numerous pandits".

All the principles indicated are not in conformity with that referred to in *Collector of Madura* v. *M. Ramalinga Sethupathy*[2]. In *Lal Sheo Pertab Bahadur Singh* v. *Allahabad Bank, Limited*[3], the Judicial Committee again discuss the question whether a female takes a qualified or absolute estate in property inherited from a female. Their Lordships again repel the argument based strictly upon the text of the Mitakshara and observe that it was too late to contend for the literal meaning of the Mitak-

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1. (1903) 13 M.L.J. 330: L.R. 30 I.A. 202: I.L.R. 25 All. 468 (P.C.).
2. (1868) 12 M.I.A. 397.
3. (1903) 13 M.L.J. 336: L.R. 30 I.A. 209: I.L.R. 25 All. 476 (P.C.).

shara to the full extent. In the judgment of the Full Bench of the Madras High Court reported in *Muthu Vaduganadha Thevar* v. *Dora Singha Thevar*[1], Justice Muthuswami Aiyar, in discussing this question observed that the widow and daughter have been treated by the Mitakshara as taking the inheritance on the authority of the same Smritis and that before the date of the Mitakshara the widow and the daughter were alike excluded from inheritance. He says that certain texts of Brihaspati and Kātyayana show distinctly that the widow took but a qualified inheritance. He observes:

> "It looks as if the Smritis in their favour converted the vedic rule of exclusion from inheritance into one of restriction on the alienation of immovable property in the interest of the heirs obstructed by their succession. I may also add that in the Danadharma of Mahabharata a religious work held in great reverence in this part of the country, it is said 'for women the heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husband's wealth".

In regard to the text of the Mitakshara that property acquired by inheritance is Stridhana, Justice Muthuswami Aiyar observes:

> "This is clearly an unwarranted interference of the Smriti law for the very conception of the Stridhanam, according to the Smritis cited by him presupposes special or exceptional modes of acquisition and is historically related to the text of Manu which declares three persons, a wife, a son and a slave are declared by law to have in general no wealth of their own. Although the Mitakshara is held in very great respect in Southern India it would still be a mistake to rank it with Statute law, it being in its nature a mere commentary and as such acquiring the force of law by its being conformed to by the people and forming thereby the basis of a customary law among them."

These observations cannot at all be reconciled with the principle laid down by the Judicial Committee even so recently as *Atmaram Abhimanji* v. *Bajirao Janrao*[2] that the commentary prevails over the Smritis. Justice Muthuswami Aiyar gave also another reason for holding that females take a qualified estate in property inherited from males, namely, that the Smritichandrika and Madhaviya differ from the Mitakshara in the interpretation of the term Stridhana. In this connection it is relevant to note that in other matters both the Judicial Committee and the High Courts have held that the Smritichandrika cannot prevail over the Mitakshara which is of paramount authority in the schools to which it applies. In *Raju Gramany* v. *Ammani Ammal*[3] in deciding the question whether a sister is

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1. (1881) L.R. 8 I.A. 99: I.L.R. 3 Mad. 290 at 330, 331 (P.C.).
2. (1935) 68 M.L.J. 673: L.R. 62 I.A. 139 (P.C.).
3. (1906) I.L.R. 29 Mad. 358.

a preferential heir to the sister's son to the Stridhanam property of a woman not married in any of the approved forms, it was held that the rule of the Smritichandrika giving the sister's son the place immediately after the husband cannot outweigh the Mitakshara. Their Lordships held that the paramount authority in the Madras Presidency is the Mitakshara. The Smritichandrika there relied upon a specific text of Brihaspati which was not referred to by the Mitakshara and this text of Brihaspati was held to have no binding force. Again in *Salemma* v. *Lutchmana Reddi*[1] the text of the Mitakshara as regards the meaning of Stridhanam again came to be discussed. The question arose as regards the succession to the emoluments attached to the office of Manyam in a government village, which were enfranchised in favour of the wife of the holder of the office after his dismissal. According to the Mitakshara this would be Stridhanam and would go to her heirs. Their Lordships observed:

"It is scarcely necessary to say that Vignanesvara's statement that Stridhanam should not be understood in a technical sense is not a mere philological observation. By laying down that proposition Vignanesvara and other great commentators who followed him succeeded in effecting a beneficial change in the archaic Smriti law and placed women almost on a footing of equality with men as regards their capacity to hold property. A departure from the law laid down by such a high authority must not be made unless supported by adequate grounds."

In this case the principle that the commentary prevails over the text was again adopted as regards the text of Kātyayana which ran as follows:—

"Wealth acquired by mechanical arts or received from affection from any but the kindred, is subject to the husband's dominion. The rest is Stridhanam."

The language of the text may seem to vest the ownership in the husband. Their Lordships observed:

" But it being well established that whatever may be the law intended to be laid down by the Smriti-writers, that law must be sought for in the writings of the commentators."

Again in *Muthappudayan* v. *Ammani Ammal*[2] in discussing the question of succession of property given to a woman by her father after marriage their Lordships again held that the Smritichandrika cannot prevail over the Mitakshara. They made the following observations:

" Certainly the Smriti Chandrika is far less favourable to woman than the Mitakshara".

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1. (1897) 8 M.L.J. 14: I.L.R. 21 Mad. 100.
2. (1897) 8 M.L.J. 9: I.L.R. 21 Mad. 58.

In *Buddha Singh* v. *Laltu Singh*[1], the Judicial Committee observe as regards the Smritichandrika:

> " Their Lordships deem it necessary to observe that Devananda Bhatta who is supposed to have been a contemporary of Aparajita admittedly differs from the author of the Mitakshara in several essential rules of law. It seems, to say the least, doubtful whether the enunciation in the Smriti Chandrika can be safely applied, except perhaps, by way of analogy to explain a dubious or indeterminate phrase or term in the Mitakshara."

Their Lordships did not rely on the Smritichandrika in the decision of the question before them.

It is worthy of note that the text of Kātyayana which is interpreted as laying down a restricted estate in property inherited by woman from a male and which is chiefly relied upon as authority for it is interpreted by the Smritichandrika as applicable to the case of undivided wealth which a widow may herself take on account of her subsistence in consequence of her father-in-law and the like not being qualified to maintain her or continuing engaged in other concerns (*Vide* Smritichandrika—T. Krishnaswami Iyer's translation, p. 158). According to the Smritichandrika therefore, the text of Kātyayana does not apply to the inheritance by the widow of the separate property of her husband. But in *Bachiraju* v. *Venkatappadu*[2], Kātyayana's text is assumed to refer to the succession of the widow to the property of her husband who died divided and without male issue. We can also now understand the reason why this text of Kātyayana is not referred to at all by Mitakshara when dealing with the question of succession by a widow to the property of her husband who died divided and without male issue.

Thus, in this most important branch of the Hindu law, the Judicial Committee did not proceed on the principle that the commentary prevails over the Smriti; nor did it proceed upon the principle that the commentary embodies the usage which overrides the written text of the law. For, in the commentary of the Balam Bhatti on the Mitakshara it is clearly mentioned that the extended meaning of Stridhanam is in accordance with the usage of good men and the commentaries of Parasara Madhava, Madana Parijata and Kalpataru also are of the same view as the Mitakshara. On the other hand, they seem to proceed on the other principle which is accepted by the orthodox theory of Hindu law that the Smritis are of

1. (1915) 29 M.L.J. 434: L.R. 42 I.A. 208 at 223: I.L.R. 37 All. 604 (P.C.).
2. (1865) 2 M.H.C.R. 402.

paramount authority being derived, from the authority of the Sruti. When confronted with this inconsistency in the argument, the Calcutta High Court in *Jagannath Prasad Gupta v. Runjit Singh*[1] observe:

"There is neither reason nor authority for saying that where the Mitakshara is, as it is clear on the point, the text of any sage which is in conflict with the rule therein laid down, can be referred to the purpose of creating a doubt". In *Mst. Thakoor Deyhee* v. *Rai Baluk Ram*[2]: "Katyayana's well-known text was referred to upon the question as to the widow's right to alienate the property inherited from her husband because upon that question the Mitakshara is silent or at least doubtful".

Upon this, as we have already seen, it cannot be said that the Mitakshara is silent or doubtful and the Judicial Committee recognises that the Mitakshara is clear that property taken by a woman by inheritance is stridhanam with all the incidents which belong to that kind of absolute property. (Vide *Sheo Shankar Lal* v. *Debi Sahai*[3].)

In regard to the question whether property got by a woman, say a mother on partition is stridhanam, the text of the Mitakshara is clear that it is. But the Privy Council in *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh*[4], held on authority of the cases in regard to a woman's inherited property, the same rule ought to be applied to property obtained on partition.

The dictum of the Privy Council that a clear proof of usage outweighs the written text of the law cannot be held to be the accepted principle of the ancient Hindu law-givers so far as the Vyavahara chapter is concerned. Usage opposed to the Smritis can never be recognised as a rule of decision according to them. The usages of a locality, of a family, or a tribe and of a caste corporation or trade guild have been expressly recognised by them. Even in these cases, according to the Mimamsa school, their binding force is derived from the authority of a lost Sruti text (*vide* Jaimani's Sutras I, iii, 4th Adhikarana, about the pramanya of Achara). In support of the dictum of the Judicial Committee reliance is placed on the text of Yagnavalkya which says that we should not adopt in conduct that which, though according to Dharma, is opposed to public opinion and not conducive to heavenly bliss. It is this text which the Mitakshara refers as a reason for laying down that an

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1. (1897) I.L.R. 25 Cal. 354.
2. (1866) 11 M.I.A. 139.
3. (1903) 13 M.L.J. 330: L.R. 30 I.A. 202 at 206: I.L.R. 25 All. 468 (P.C.).
4. (1911) 22 M.L.J. 462: L.R 39 I.A. 121: I.L.R. 34 All. 234 (P.C.).

unequal partition among sons, though allowed by the Smritis, is not legal. This is done in its commentary on verse 126 of Yagnavalkya Smrithi in which the Mitakshara refers to other instances where a certain rule, though enjoined by the Sastras, is not followed in practice, as it is opposed to public opinion. All these, however, are not instances of a custom varying the rule of law, but are only illustrations where a rule has become obsolete in practice. The rule of unequal partition, namely, of giving an extra share to the eldest son, was, according to the view of Apastamba, not merely obsolete, but opposed to the Sastras, inasmuch as it has not got the support of a Sruti text, which, on the other hand, indicates that partition among sons must be equal. According to the modern way of looking at it, it is only an instance of a later Smriti modifying the rule of the earlier and can never afford any instance from which the principle that proof of usage outweighs the written text of the law, can be derived. It furnishes only an illustration of the fact that law re-acts according to public opinion, and changes in the law are effected owing to changed conditions of times and the opinions of society. Another text of Manu (Chapter VII, 203) is also relied upon in support of the above dictum of the Privy Council, which states that the king should make authoritative the lawful customs of the inhabitants. This is in connection with a conquered country. It only indicates the well-known principle that the laws of the conquered country are respected as the usages of the conquered people. This can never be said to be in support of the principle that usage varies the principle of the Smritis. Moreover a similar rule enjoining the king to respect the usages of the conquered people is to be found in Yajnavalkya, Chapter on Rajadharma (I, 342) and in the commentary of the Mitakshara on this verse, a qualification is added that these usages should not be opposed to the Sastra. Hence even in the case of conquered countries the usages cannot override the rule of the Smritis. Dr. Jolly in his 'Hindu Law and Custom' refers to another text of Katyayana which is quoted in the Smriti Chandrika. In defining the usages of a locality, Katyayana says that if they obtain in a place as ancient, immemorial usage not opposed to the Sruti or the Smriti, it will be the law of the locality and should be recorded in books, and the decision should follow these rules so recorded in books with the seal of the king. This text too is only an instance of

the Smritis recognising the binding force of a local usage, just as they have recognised the binding force of the usage of a family or tribe, caste corporation or guild. We may therefore rightly and safely come to the conclusion that so far as the law of the Smritis and commentaries is concerned, it cannot be said that there is any general principle that usage outweighs the written text of the law.

The notion that the commentaries and digests are records of existing usages and on many occasions of the changing usages of the people, if pushed to the logical extent, will lead to the result that the British Courts must recognise the binding force of commentaries written in recent times also or which may be written in the future by learned pandits, as according to the accepted theory, they will also embody the present day usages and changes and they must have as much binding force as the commentaries and digests of the 17th and 18th centuries.

SUMMARY OF ENGLISH CASES.

TRADE INDEMNITY COMPANY, LIMITED *v.* WORKINGTON HARBOUR AND DOCK BOARD, (1937) A. C. 1.

Contract—Construction of works—Tenders—Lowest tender accepted—Tenderer finding insurance company to guarantee—Board later advancing moneys to contractor—If those sums also go under the guarantee—Nature of the contract—Insurance or guarantee.

A Harbour and Dock Board at *W* had resolved to construct an enlarged dock at *W*. Tenders were invited from a number of contractors. With the invitation for tenders a document of 'instructions' was sent informing them (1) as to where the contract documents can be inspected, (2) that the contractor must independently obtain for himself, on his own responsibility, all information necessary for making a tender, nature of the site, surface, surroundings, roads, waterways, facilities for mooring, etc., nature and height of the tides, etc. "and must examine and consider all other matters and all possible and probable contingencies and generally must obtain his own information on all matters affecting the construction, completion and maintenance of the works, and as to all matters which may influence him in making his tender". The instructions further stated that the Board will not be responsible for any information that the tenderer may obtain from its employees or otherwise except such as may be given in writing by the Clerk and Manager. K. R. Company offered the lowest tender and that was accepted by the Board on condition that they provided

a guarantee of 50,000*l.* for the performance of the contract. In order to comply with this condition, K. R. Company procured a bond from the appellant company (T. I. Co., Ltd.) whereby the T. I. Company jointly and severally bound themselves with the K. R. Company to the Board for the due performance of the contract by K. R. Company in terms of the contract. After the Board accepted the contract, K. R. Company began the work in October, 1922. In 1924 the K. R. Company found itself in financial difficulties and the Board advanced to them sums of 20,000*l.* once and 25,000*l.* again in pursuance of an agreement as to its return, etc. In 1926 K. R. Company made default in carrying on the work and the Board completed the works itself through other contractors and claimed that 78,785*l.* was due from the contractors K. R. Company. In the meantime K. R. Company went into liquidation. The 78,785*l.* included the unascertained sum due under the advances of 20,000*l.* and 25,000*l.* also. The Board claimed 50,000*l.* towards this sum from the T.I. Company as guarantors. The defendants (T. I. Co.) pleaded that this was a contract of insurance, that there was non-disclosure of material facts by the Board which vitiated the contract and that 45,000*l.* was advanced to K. R. Company without their knowledge for which they will not be liable.

Held, that this was a contract of guarantee and the rights of the parties should be relegated on that footing. There has been no such concealment as to preclude the plaintiff Board from recovering. But the T. I. Company are not bound by the loan transactions or by the contractors and the Board agreeing that the ultimate balances of the loans should be included in the cost of completing the work. The T. I. Company which was no party to it cannot be bound. "The guarantors are no more affected by this than they would be if the parties had entered into another and additional construction contract elsewhere and agreed that the liabilities under both should be pooled and treated as liability under the guaranteed contract". The guarantors cannot be made liable under the new obligation in respect of the new and uncontemplated loan transaction.

WORCESTER CORSETRY, LIMITED *v.* WITTING, (1936) 1 Ch. 640.

Company—Articles —Construction— Power to directors to appoint additional directors—If complete surrender of power by company to appoint directors.

Article 12 of the Articles of Association of a company provided that "until otherwise determined by a general meeting the number of directors shall not be less than two nor more than seven". Arts. 83 to 85 of Table A of the Companies (Consolidation) Act of

1908 provide:—"Art. 83. The company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office." "Art. 84. Any casual vacancy occurring in the board of directors may be filled up by the directors, but the person so chosen shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director." "Art. 85. The directors shall have power at any time, and from time to time, to appoint a person as an additional director who shall retire from office at the next following ordinary general meeting, but shall be eligible for election by the company at that meeting as an additional director."

The company convened an extraordinary general meeting for the appointment of two additional directors and passed resolutions appointing two directors. The question was if the power of appointing additional directors was under the company's articles vested in the directors alone or can be exercised by the company.

Held, that in this case the power of appointing additional directors was not given expressly to the directors to the total exclusion of the powers of the general meeting. Only a special emergency power is given to the directors to appoint an additional director for a limited period, which appointment lapses when the corporators assume control over the appointment or removal, as the case may be, of directors at their ordinary general meeting.

Blair Open Hearth Furnace Co. v. Reigart, 108 L.T. 665 distinguished as a case where Art. 93 of that company's articles provided that "the directors may from time to time appoint additional directors, but so that the total number of directors shall not exceed the prescribed maximum" which was construed as effecting a complete surrender by the company to the directors of the company's inherent power to appoint additional directors.

N.B.—Arts. 83 to 85 correspond verbatim with Arts. 83 to 85 of the First Schedule, Table A of the Indian Companies Act (VII of 1913).

In re MARR'S WILL TRUSTS. WALKER *v.* ATTORNEY-GENERAL, (1936) 1 Ch. 671.

Will—Testator domiciled in England—Will creating a trust to establish educational charities in Scotland—Opening of a College, etc., in Scotland—Surplus remaining—Application to settle a scheme to apply funds cypres—Trustee to submit to Court of Session, Scotland.

The testator, a native of Scotland but domiciled in England, executed a will whereby after certain bequests, he gave all the

residue of his estate to trustees for conversion and investment and directed them to apply the same in the advancement of education of persons *bona fide* resident in Troon, a town in Scotland. The will was proved in England. After building a college and opening it, there was a balance left in the hands of the trustees. As there was disagreement between the commissioners appointed under the Educational Endowments (Scotland) Act, 1928, and the trustee and the Town Council of Troon about the proper scheme for the trust, the commissioners refused to procced further, with the result the trustee of the will was left free to bring forward a scheme in accordance with the trusts of the will subject to the approval of the Court. A scheme was then brought forward before the English Court and it provided that the scheme was to come into effect when the same had been finally approved by the Court of Chancery in England and Court of Session in Scotland.

Held, that the words "subject to the Court of Chancery in England" should be deleted and the trustee was to carry into effect a scheme for the administration of the charity to be settled by the Court of Session in Scotland.

In re CROCKER AND *In re* TAXATION OF COSTS, (1936) 1 Ch. 696.

Practice—Solicitors Act, 1932—Motor insurance—Policy giving the defence of action for damages for accident to the insurance company—Accident—Action for damages against the motorist—Action defended by company—Solicitor engaged by company for defendant—Defendant assured desiring to inspect papers relating to the action in the hands of solicitors—Company objecting to it—Solicitors if can refuse inspection.

W. G. was driving a motor car in which there was a passenger *A. G.* There was a collision between the motor car and a motor vehicle driven on behalf of a firm *T.* A suit was brought by *A. G.* against *W. G.* and *T.* claiming relief in respect of the injuries sustained by him. *W. G.* retained as his solicitors the firm of solicitors now in question. That action ran its course. *W. G.* wanted access to the papers relating to the suit which were in the custody, possession or power of the solicitors to inspect and to make notes of their contents and to have copies of the same.

W. G. was insured under a policy against the third party risks. The policy provided for the conduct of the defence by the insurance company itself of any action for negligence against the policy holder. In pursuance of that the insurance company engaged the solicitors in question to defend the action brought by *A. G.* The insurance company was not a party to the action but only *W. G.* The solicitors delivered a defence on behalf of *W. G.* admitting

negligence and a judgment was given against him for *924l.* *W. G.* pleaded that he had never given them any authority to admit any negligence by him and therefore wanted to see all the papers in the action in order to ascertain what had happened. The Solicitors denied the right of *W. G.* for inspection contending that the provision in the policy giving absolute conduct of the suit has the result, namely, that the insurance company are entitled to direct the solicitors not to give effect to the applicant's *prima facie* right as client to see the documents with his solicitors.

Held, that the policy does not give such rights to the insurance company. The applicant may not be entitled to the custody of the documents in the absence of, or when opposed by, the insurance company. But that cannot prevent *W. G.* from seeing the documents which relate to the action and are in the solicitor's custody. The Court has inherent jurisdiction and also power under Solicitor's Act 1932 to order inspection.

In re SPOLLON AND LONG'S CONTRACT, (1936) 1 Ch. 713.

Vendor and purchaser—Sale of land under an open contract—Alteration in deed as to consideration—Marketable title—What is—Insufficiently stamped title deed—Purchaser, if can be compelled to buy.

In 1935 *S* agreed to sell to *L* under an open contract the unexpired portion of 68 years of a leasehold property at a particular rent for the purchase price of *190l.* An abstract was delivered to the purchaser's solicitor, who found that the stamp on an assignment deed of 1912 which was a link in the title of the vendor was insufficient for the consideration of *75l.* *12s.* 6. mentioned in that deed and called on the vendor to make any rectification necessary prior to completion. The vendors wrote back enclosing a letter of Mr. G the solicitor who acted for the assignors under the 1912 assignment saying that the consideration for that assignment of 1912 was *22l.* *12s.* *6d.* and not *75l*, odd and that the stamp was therefore sufficient and that the deed must have been subsequently altered after execution. The vendors then got Mr. G (solicitor) to agree to make a statutory declaration in support of the facts set out in his letter. But the purchaser was not willing to proceed further with the purchase.

Held, that in the absence of any evidence to the contrary, there is a presumption that the alteration in the deed was made before execution. As a result this assignment deed, without any other proof, would appear to be a proper deed but insufficiently stamped. Where a vendor is selling immovable property under an open contract, the purchaser is entitled to have a good marketable title.

Where a prior title deed which is a link in the vendor's own title is insufficiently stamped, it is a matter of serious importance to the purchaser as it will not be admissible in evidence; and the purchaser cannot be compelled to accept such a title and complete the contract accepting a statutory declaration which on the face of it contradicts the *prima facie* title as shown by the abstract.

In re A DEBTOR, (1936) 1 Ch. 728.

Insolvency—Creditor's petition for adjudication—Alleged act of insolvency being a deed of assignment for benefit of creditors—Petitioning creditor not assenting to the deed but agreeing not to upset the deed—If can rely on the deed as an act of insolvency—Bankruptcy Act, 1914, S. 5, sub-S. (3).

The debtor in question was indebted to the creditor in a considerable sum and he had also obtained a judgment in respect of it. Afterwards a deed of assignment for the benefit of creditors was executed and at the meeting of the creditors, the petitioning creditor made it plain that he was not going to sign the deed. But he agreed on January, 1931, "not to do anything to upset the deed of assignment, not to enforce the bankruptcy notice which has been served on (the debtor)" and added that "this, of course, does not mean that we will at no time take bankruptcy proceedings against (the debtor). It merely means that we shall stand aside for the present time, and will not assent to the deed". In March the creditor filed a bankruptcy petition alleging the execution of the deed as the act of bankruptcy.

Held, that the petitioning creditor was precluded in the circumstances from relying on the execution of the deed of assignment as an act of bankruptcy. A creditor who is a party or privy to the deed or who has acted in any way which would be equivalent to an assent, recognition or approval of the deed, cannot allege that the execution of the deed is an act of bankruptcy, By saying that he will not do anything to upset the deed, the creditor has *recognised* the deed and *approved* of it, though not assented to it. In those circumstances the Court is bound to refuse to allow the creditor to rely on the deed as an act of bankruptcy and that will be sufficient cause within the meaning of S. 5, sub-S. (3) of the Bankruptcy Act, 1914, for not making an order in the petitioner's favour.

Ex parte *Stray,* L.R. 2 Ch. 374, followed.

In re HEPWORTH. RASTALL *v.* HEPWORTH, (1936) 1 Ch. 750.

Legitimacy Act, 1926—Person born illegitimate—Subsequent legitimation of—Will—Testator dying before legitimation—If the illegitimate person can take under the will by virtue of legitimation.

A testator made his will in 1918 and died in 1922. He had 6 children. One of those children was *P*. *P* married *E* in August 1915 but it was only after the birth of his daughter (first defendant), who was born in January, 1915. Father *P* died in 1928 and his share under the testator's will became distributable equally among his *children* who survived him. The first defendant who was illegitimate became legitimated by virtue of the Legitimacy Act, 1926 but the date of legitimation was according to the Act only January, 1927. The question was if the first defendant took under the will as a child of *P*.

Held, that she cannot take because the disposition was a disposition which came into operation before the date of the legitimation. The disposition in this case is the will of the testator. It cannot have been intended by the Act that the date of the disposition should depend upon the time at which some benefit given to a beneficiary becomes payable or ceases to be contingent and becomes vested. The material date is the death of the testator and since she was not then entitled to any interest under the will she is not now entitled to participate.

In re SHARMAN'S CONTRACT, (1936) 1 Ch. 755.

Vendor and purchaser—Sale of land—Sufficient description in deed—If purchaser entitled to a plan at vendor's cost.

Where the description in the contract is without a plan insufficient to identify the property sold, the purchaser may require it to be supplemented by a plan. But where the description in the contract affords a sufficient and satisfactory identification of the land sold, then the purchaser cannot insist on a plan being supplied to him at the vendor's cost.

In re *Sansom and Narbeth's Contract,* (1910) 1 Ch. 741, discussed and distinguished.

In re ANCHOR LINE (HENDERSON BROTHERS), LIMITED, (1937) 1 Ch. 1.

Contract—Sale of goods—Sale of a crane 'for a deferred payment'—Delivery of crane to purchasing company—Annual payments to be made for depreciation and interest—Amount paid for depreciation to be taken into account when full purchase price paid—Construction of contract—Sale of Goods Act, 1893, S. 18—Applies only when a contrary intention does not appear.

By a contract of sale of a crane it was agreed that the purchasing company should take over the crane for a deferred purchase price of 4,000*l.* that until the completion of the purchase the purchaser should pay at a particular rate per year for interest and

depreciation, that of these sums the sums representing depreciation are to be deducted from the 4,000*l.* in order to arrive at the balance actually to be paid by him on completion of the purchase whenever that may take place, that in the meantime the purchaser is to have entire charge of and responsibility for the crane in every respect. The purchasing company made some payments but before payment of the whole purchase price of 4,000*l.* the company went into liquidation. The *interim* liquidator shortly after entered into a contract to sell all the assets of the purchasing company to a new company, which was also sanctioned by the Court. The question was if this crane was also included in the assets of the firm which passed under the contract of sale of the *interim* liquidator, that is, whether it was a crane 'belonging to the old company and used in connection with the said business'. The vendors claimed that the liquidator must either accept the obligations under the contract and pay the instalments due under the contract or return the crane.

Eve, J., held that the property in the crane passed to the purchasers on the making of the contract in accordance with S. 18, R. 1 of Sale of Goods Act, 1893 (1936) 1 Ch. 211.

Held, on appeal, that S. 18 does not apply here, because it can only apply according to its terms "unless a different intention appears" and here a different intention appears, namely, that the property should not pass until the purchase is completed. The purchasing company were merely bailees responsible for its safety and for its preservation to the owners, that is, the vendors. The vendors were therefore right in claiming as against the purchasing company the balance of the moneys which are due under the contract, as in the circumstances the official liquidator must be deemed to have adopted the agreement for sale of the crane.

In re THORNBER. CRABTREE *v.* THORNBER, (1937) 1 Ch. 29.

Will—Construction—Annuity to mother—Annuity to wife out of the income of residue—Surplus income from residue to be accumulated for children of testator—Testator dying without issue—Trustees under the will to stop accumulation and deal with it as on intestacy.

By his will dated March, 1933, the testator *T* who died in June that year bequeathed to his mother a certain annuity and after some other bequests bequeathed all the residue on trust for sale and conversion and out of the proceeds of such sale directed the trustees to pay his debts, etc. and hold the residue "(*a*) to pay out of the income therefrom an annuity to his wife during her life of 10*l.* per week; (*b*) to invest and accumulate the surplus income as an accretion to capital for a particular period after his death and after his

wife's death to hold the capital residue and the accumulations from income" for the children of the testator. The testator never had any children and died without issue and his widow therefore claimed that the accumulations should cease and that the surplus income should be dealt with as income from the residuary estate undisposed of by the testator, whereas the mother contended that the accumulation should be continued.

Held, that there was no provision in the will to which the property, which, in fact was not effectively disposed of by the will inasmuch as there were no children to take it, was subject. The purpose having failed there was no effective disposal by the will within the meaning of S. 49 of the Administration of Estates Act, 1925. If the widow here disclaims her right to the annuity of 10*l.* a week, then she will be entitled without any further qualification, except for the provision in favour of the mother to have the income of the residue.

JERVIS *v.* HOWLE AND TALKE COLLIERY COMPANY, LIMITED, (1937) 1 Ch. 67.

Document—Lease—Rectification of deed—Intention of parties different from the deed—If rectification can be allowed.

Where the deed as executed does not carry out the intention of the parties to the deed and there is "strong irrefragable evidence" that when the parties executed the document they thought that its effect would be what in fact it would be if the document were rectified as the plaintiff asks, the Court is bound to direct rectification in accordance with the plaintiff's claim.

Shelburne v. *Inchiquin*, 1 Bro. C. C. 338 and *Burroughes* v. *Abbott*, (1922) 1 Ch. 86, followed.

In re CARNARVON HARBOUR ACTS, 1793 TO 1903. THOMAS *v.* ATTORNEY-GENERAL, (1937) 1 Ch. 72.

Practice—Procedure—Rules of Supreme Court, O. 54-A. r. 1-A —Harbour Board—Summons by clerk of—Summons to determine the extent of Board's powers—No act attempted—If summons maintainable.

O. 54-A, r. 1-A of R. S. C. provides that "In any division of the High Court any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of a statute, may apply by originating summons for the determination of such question of construction, and for a declaration as to the right claimed".

The clerk to the Carnarvon Harbour Board took out a summons making the Attorney-General a defendant for the purpose of obtaining a determination by the Court of the question whether having regard to the provisions of the Settled Land Act, 1925 and certain relative provisions in the private acts of the Board, the powers given by the Settled Land Act of sale and leasing, in so far as they are wider than the powers given by the private Acts, may be exercised, and to that extent the powers of the private Act may be treated as extended. The trustees did not purport to exercise any such powers and the defence was raised that the Court ought not to determine the powers of the plaintiff in proceedings to which the Attorney-General is the only defendant and in which no particular exercise of any power is called in question.

Held, that to grant the declaration would fetter the discretion of the Attorney-General under the Act. Also the declaration if granted would not bind any individual member of the public who may feel aggrieved by the exercise of the power by the Board, in any proceeding that might be taken by such person against the Board. If for instance the Board *bona fide* exercise the power of leasing and grant to a person a lease which is ultimately decided by the Court in proceedings between the Board and the lessee to be invalid as *ultra vires*, then no decision on the summons will prevent litigation in future. If it be that this should bind him and every one of the public, then that will be a cause of grievance to the individual who desired to bring proceedings himself against the Board. In those circumstances the court should not, in the exercise of its discretion, grant such a declaration.

REED *v.* CATTERMOLE, (1936) 2 K.B. 645.

Income-tax—Minister of Methodist Church—Appointment of as minister of a circuit of 9 churches—Compulsory residence as a requirement of the office—Payment of rates on the house by employers—If Minister occupant also liable to tax as on occupation.

The appellant was appointed minister of the *W. M.* circuit of Redhill, Surrey. The circuit consisted of 9 churches. His said appointment required that he should go and live at a particular manse in order that he may perform his duties. Though it was too large for his needs, he was not allowed to sublet the manse nor to make any profit out of his occupation. The cost of furnishing, decoration and repairs is to be borne by the circuit. The Sch. A tax, the rates and water rate were defrayed by the circuit.

Held, that the minister is not liable to tax under Sch. E in respect of his occupation of the manse. He was not in beneficial occupation of the manse. Where the residence of the person sought

to be rated or taxed in the house in question is for the interest of the employer and for the more effectual performance of the service required from such person, and the latter is required to live in that particular house whether it is suitable for him or not in order that he may perform his duties, then the occupation is the occupation of the master and not of the servant.

Tennant v. *Smith,* (1892) A. C. 150; *Lady Miller's case* (1930) A. C. 222 and *Nicoll* v. *Austin,* (1935) 19 Tax Cases 531, distinguished.

Dobson v. *Jones,* (1844) 5 Man. & G. 112; *Bent* v. *Roberts* (1877) 3 Ex. D. 66; 1 T.C. 199, approved.

CHURCHILL & SIM *v.* GODDARD, (1937) 1 K.B. 92.

Principal and agent—Del credere *agents—Sale of goods by a foreign exporter—Sale through agent in England—Seller forwarding shipping documents of goods to agent—Agent paying for the goods deducting his commission—Agent sending goods to the buyer —Bill of exchange drawn by agent for acceptance by buyer—Buyer accepting the bills—Buyer rejecting the goods later for proper reasons—Bill dishonoured by the buyer—If entitled to so dishonour—Bills of Exchange Act, 1882, Ss. 2, 27, 30, 38 and 54.*

The plaintiffs are timber brokers carrying on business in England. The defendant *G* is a timber importer and merchant in Liverpool. The plaintiffs were the sole agents in England for a Finnish timber exporter *R*. As per contract between the plaintiffs and *R*, the plaintiffs were to stand full 100 per cent. *del credere* for all sales through them and payment should be made by them in cash to *R* against shipping documents, deducting their commission which was as a result high. *R* as usual sent to the plaintiffs wood-goods by ss. "*Sonja*" for being sold to *G*. The plaintiffs received the shipping documents, paid for them and then drew drafts on *G* for acceptance. *G* accepted the drafts and returned them on 26th October, retaining the shipping documents with him. Later the defendant *G* rejected the cargo on the ground that it was not as specified and on presentment the bills were dishonoured. The plaintiffs thereupon filed this suit on foot of the bills. It was assumed that the rejection of the goods was for proper reason, as it was found so by arbitrators and the only question was if the plaintiffs were only agents for *R* and were suing as agents or trustees of *R* and as such there was no consideration for the acceptance, or *G* having accepted the bills of exchange for the shipping documents and retained those documents, he could not set up breach of contract by another party.

Branson, J., held that what was done was carried out under the existing contract of purchase and sale, that the acceptance of the bills by the defendant in exchange for shipping documents did

not constitute a new contract between the plaintiffs and the defendant, that the plaintiffs were only agents for sellers and that the rejection was therefore justifiable.

Held on appeal (reversing Branson, J.) that when the plaintiffs parted with the shipping documents and paid *R* they had no reason to suppose but that everything was in order with the shipment. It is true that the plaintiffs were *R's* authorised agents to receive payment when they handed over shipping documents but that was only to give the buyer somebody to whom he can pay to get a discharge of his debt. But when the buyer has given a bill or money to the plaintiffs, the person receiving them might hold them for himself in his own right or for the seller according to the circumstances regulating his relationship with the seller. On the facts here the plaintiffs were in no sense agents or trustees for *R* when they sought to recover on the bills. The plaintiffs had settled with *R* and hence are entitled to sue on the bills in their own right. Further the consideration in the bills is stated to be "value received in wood-goods per ss. "*Sonja*" with no reference to the description of the goods as per original contract and it will be impossible without going outside this contract to show a failure of consideration. To hold otherwise would make *del credere* agents, who are already responsible to the sellers for payment by the buyers, also responsible to the buyers for due performance of contracts on the part of sellers.

SKILTON *v.* EPSOM AND EWELL URBAN DISTRICT COUNCIL, (1937) 1 K.B. 112.

Highway Act, 1835—Road Traffic Act, 1930—Highway—Studs inserted in the road for traffic regulation—Cyclist—Injury, to while using the road—Stud loose for some time prior to that—Local authority's negligence—Non-liability of authority for maintenance of highway—If doctrine applies to case of studs in highway.

The plaintiff *S* was passing a part of the road in the area in which the defendant council were the Highway Authority. In the middle of that road, there was a line of studs put up for purposes of regulating the traffic. When she was a few feet from the Kerb, a car passed her and one of the studs which was loose flew from its position across the road and knocked the front wheel of her bicycle, with the result that she fell and sustained injuries. It was found that the stud was in a dangerous condition for some weeks before. *S* thereupon filed this suit for damages for personal injuries caused to her by the Council's negligence.

Held, that assuming that the stud in question was physically a part of the highway, the District Council is liable to the plaintiff

for the damage caused to her, because they have done something on the highway, not for the purpose of maintaining it as a highway but for a totally different purpose, namely, traffic direction under the Road Traffic Act, 1930 and the act which they did became a nuisance on the highway and the council was therefore responsible if the stud which by its nature may be dangerous by want of proper maintenance and by want of proper reparation is allowed to be in such a dangerous condition as to cause injury to a passer-by. This is not a case where the plaintiff seeks to render the highway authority liable for non-repair of the highway, in which case on the authority of *Cowley* v. *Newmarket Local Board*, (1892) A.C. 345, etc., the highway will not be liable but a case where the act of placing the studs was done by the council not in pursuance of their duties to *maintain* the highway, but in pursuance of other duties or powers conferred on them under the Road Traffic Act, 1930.

HORN *v.* MINISTER OF HEALTH, (1937) 1 K.B. 164.

Housing Acts, 1925, 1930 and 1935—Local Government—Compulsory acquisition of land—Objection thereto by owner of the land —Public inquiry by an inspector—Report by, to Minister—Hearing of council representatives before confirmation—No representations heard regarding this order of acquisition—Deputation only about general policy of acquisitions and subsidy—Nature of the Minister's acts when hearing objections.

In pursuance of their powers under Part III of the Housing Act, 1925, the Council of *S* made in August, 1935, a compulsory acquisition order of certain lands in the ownership of one *H*. He preferred objections to the confirmation of the order by the Minister of Health. In December, a public local enquiry was held by one *B* an inspector of the Minister. At that inquiry the Town Clerk said that the land was required partly for slum clearance and rehousing and partly for the erection of new houses which were required under the Housing Act, 1935, to obviate over-crowding. The main objection of the owner was that the Council had plenty of land of their own and did not require to take his farm for the purpose. The Inspector made his report to the Minister. The Council before holding of the inquiry, asked for an interview with the Minister in order that he may, in his administrative capacity, deal with their general requirements but they could not get an appointment before the public inquiry. They got an interview later, after the public inquiry and before the confirmation of the compulsory acquisition order. The Minister later confirmed the order and the owner thereupon filed this action for quashing the order of confirmation on the ground that representations must have been made to the Minister behind the back of the objector in order

to persuade the Minister and confirm the order of the Council. But the representatives of the Council and of the Minister deposed that nothing was said about it at the interview but only questions about the subsidy, etc., were discussed.

Held, that if at that meeting representations had been made to the Minister of Health behind the back of the objector in order to persuade the Minister to confirm the order made by the Council, then there would have been ample jurisdiction in the Court to say that such action was not only contrary to natural justice but also contrary to that which is implied in the powers given to the Minister under the statutes. The Minister here had two different functions, those under 1925 Act and those under 1935 Act. Under the 1925 Act it was his duty to consider and confirm, with or without modification if he thought fit so to do, the order which the local authority made to acquire properties compulsorily. Then he acts quasi-judicially. The Act of 1935 by S. 1 puts upon the Council a duty to inspect and make reports to the Ministers and proposals as to over-crowding, when the Minister acts as an adviser. The interview was only concerned with that general question and had nothing to do with the order of compulsory purchase and as such there was nothing illegal in the order.

Per *Scott, L.J.*—Where public departments are given under this type of Act quasi-judicial duties as well as administrative duties, the need of their carrying out quasi-judicial duties in strict accordance with natural justice must always be considered in the light of their administrative duties also.

KEARNS *v.* GEE, WALKER AND SLATER, LIMITED, (1937) 1 K. B. 187.

Negligence—Statutory duty—Breach of—Accident—Defence of common employment, if open—Mechanical power—If includes electric power—Meaning of Reg. 31 of Building Regulations 1926.

K, a workman, was engaged by the defendant G.W. & S. Co., and was employed in bricking the open part of a steel building. There was a staging erected over the particular part of the building where he was working, extending to about 12 feet. On that were deposited boxes of bricks to be used for filling up the spaces which were left after the steel structure had been erected. On the building there was an electric crane to lift those boxes of bricks. While working on this brickwork, a number of bricks fell from a higher part of the building, hit the workman on the head and back and injured him. There was, above the place where *K* was a workman, no cover to protect him from being struck by any falling material. *K* thereupon claimed damages on the ground that the employers

were guilty of a breach of regulation 738 of the Building Regulations, 1926, made under the Factory and Workshop Act, 1901. The Regulation applies "to all premises on which *machinery worked by steam, water or other mechanical power* is temporarily used for the purpose of the construction of a building, or for the purpose of any addition to the structure of an existing building", and Regulation 31 provides that "any part of the premises in which any person is habitually employed shall be covered in such a manner as to protect any person who is working in that part from being struck by any falling material or article."

Held the employer was liable. An electric crane is a 'machinery worked by....other mechanical power'. It is not necessary that the person who is hit must be 'habitually employed' there. If anybody in employment goes to a part of the premises where there are persons habitually employed and is hit, he has his remedy, and the employer will have committed an offence under the Regulations. If, on the other hand, the place where the accident happens is a place where persons are not habitually employed, and it is an exceptional thing, if a particular person is in that particular place for a moment, then there is no offence, and that particular person gets no right of action for breach of *statutory* duty. When it is a breach of statutory duty that is relied on, the defence of common employment would not be applicable if the injury was caused by a fellow servant.

DOLBY *v.* HALMSHAW, (1937) 1 K.B. 196.

Game License Act, 1860, S. 5—"Coursing with greyhounds" in S. 5—Meaning of.

One *H* was riding his horse in a field with the permission of the owner and had two of his greyhounds with him. There were no other persons or dogs present. The two greyhounds chased a hare in the field, overtook it and killed it. *H* then went across the field to where the greyhounds were and picked up the hare. *H* was charged under S. 4 of the Game License Act 1860, with having killed game, namely, a hare without a license to kill game. *H* relied on S. 5 (3) which makes "the pursuing and killing of hares respectively by coursing with greyhounds, or by hunting with beagles or other hounds" an exception to S. 4.

Held, that *H* was not guilty. Coursing within the meaning of the exception means the pursuing of hares by greyhounds not solely at coursing meetings, but also for sport other than that of a man going out with a single greyhound to pick up what game he could get, and also by way of training the greyhounds. The acts of *H* were consistent with his testing one dog against the other, and he was coursing with the hounds within the meaning of the excep-

tion. *Rex (Nevin)* v. *Clarke* (1930) N. I. 174 in so far as it restricts coursing to the well known sport and restricts coursing in the exception to coursing of hares in an organised way not approved.

WARNER BROTHERS PICTURES, INCORPORATED *v.* NELSON. (1937) 1 K.B. 209.

Injunction—Film artist—Contract to serve for two years exclusively for plaintiff—Breach of—Remedy—Damages or injunction.

In 1934 Mrs. N, film artist entered into a contract with the plaintiff firm agreeing "to render her exclusive services as a motion picture and or legitimate stage actress" to them and to perform solely and exclusively for them for 52 weeks, with an option to producers to extend it for another term. She further agreed expressly that "she will not during the term of contract render any services for or in any other phonographic, stage or motion picture production......or engage in any other occupation without the written consent of the producer being first had and obtained". In 1936 Mrs. N, in admitted breach of the contract, declined to be further bound by it and entered into an agreement to appear as a film artist with a third person. Thereupon the plaintiff company brought an action to restrain her (N) from acting for others and for damages. Mrs. N contended that no injunction could as a matter of law be granted in the circumstances of the case and that the contract was illegal as in restraint of trade.

Held, that where, as here, the covenants are all concerned with what is to happen whilst the defendant is employed by the plaintiffs and not thereafter, there is no room for the application of the doctrine of restraint of trade.

The Courts will not enforce specifically a positive convenant of personal service but in the case of negative covenants, the courts enforce the negative covenant by an injunction. If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, the court by way of injunction says, what the parties have already said, that the thing shall not be done. There is then no question of balance of convenience or inconvenience, or of the amount of damage or of injury. The conclusion to be drawn from the authorities is that, where a contract of personal service contains negative covenants the enforcement of which will not amount either to a decree of specific performance of the positive covenants of the contract or to the giving of a decree under which the defendant must either remain idle or perform those positive covenants, the court will enforce those negative covenants, limiting it to what the court considers reasonable in all the circum-

stances of the case. Injunction is the proper remedy in this kind of case and not damages.

Lumley v. *Wagner*, 1 De G.M. and G. 604 and *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.* (1926) A. C. 108 followed.

BROWN *v.* BROWN, (1937) P. 7.

Divorce—Purchase by wife of an annuity—Deed arranging the annuity to be paid to husband—Subsequent divorce—If the deed a post-nuptial settlement liable to variation or a gift.

In pursuance of an oral agreement, the wife signed a form containing a proposal to an Assurance Company that in consideration of payment by her of 2097*l.* 10*s.* 2*d.* the company should pay to her husband for his life an annuity of 104*l.* The wife paid the amount to the company and the company executed a deed whereby it agreed both with the petitioner (wife) and the respondent (husband) to pay to the respondent or his assigns an annuity of 104*l.* By reason of the adultery of the husband the marriage was later dissolved. The wife then applied for variation of the deed treating it as a post-nuptial settlement.

Held, that the annuity is not a settlement but a gift and hence cannot now be varied. When the petitioner handed over the consideration money she parted with the *plenum dominium* of the property so transferred. It is no limitation of his property that the payments to be made to him are to be made annually.

In THE ESTATE OF MABEL AMY LONG (DECEASED). (1936) P. 166.

Wills Amendment Act 1852, S. 1—Holograph will—Bequests on one page—Will on the other page—Evidence that bequests were completed before execution—If bequests valid.

A will was written on one sheet of paper. The whole of one side of the paper was occupied with the spicific legacies beginning with the words "I give and beqneath to my dear friends the following sum" etc. and ending with the words "The residue to be divided between..." There was no mark on the paper to indicate that the words last quoted were the concluding words of the will. The other side of the papers contained the words "This is the last will and testament of Mabel Amy Long" followed by the appointment of the executor. After the appointment of the executor, a line was drawn across the paper, indicating finality and then followed the attestation clause with the signature of the testatrix and two witnesses. There was satisfactory evidence that the side of the page containing the bequests was written in its present

form before the signatures of the testatrix and witnesses were made but there was no evidence of the sequence in which the pages of the will were written. The question was if the will as a whole was entitled to probate or only the second page.

Held, that if the Court is satisfied that the whole will was written before the signatures were made and that the dispositive part of the document may be fairly read as preceding and leading up to the part containing the signatures, and in no sense as a mere annexe or schedule thereto, it would be transgressing 'the spirit of the Act' to insist, as a criterion of valid execution, upon proof that the several parts of the document were actually written in any particular order.

HERD *v.* HERD, (1936) P. 205.

Divorce—Wife's petition for dissolution—Domicil of husband—Desertion by husband—Acquisition of domicil elsewhere by husband—Jurisdiction to decree divorce.

Parties were married in England in 1905. Their matrimonial home was in England and their domicil English. In 1923, the husband left his wife in England and went to the United States. In 1932 the wife discovered that he was living with another woman. In 1934 the wife filed a petition for divorce in England. The husband was naturalised in U. S. in 1930, which involved that he had acquired a new domicil of choice there and renounced the domicil of origin in England.

Held, that under British Law the jurisdiction to decree divorce depends on domicil. The domicil of the husband determines the domicil of the wife and independent authority to decree divorce cannot co-exist at the same time in two states; and this rule applies even where the husband, having his domicil of origin in England, has married his wife in England and has deserted her in England, and has gone abroad. The wife cannot file a petition in England for divorce after the husband has changed the domicil of origin.

Ogden v. *Ogden*, (1908) P. 46 doubted.

Lord Advocate v. *Jaffrey*, (1921) 1 A.C. 146 and *Attorney-General for Alberta* v. *Cook*, (1926) A.C. 444 followed.

JOTTINGS AND CUTTINGS.

Statute Making.—The process of statute making leads to results which, as is well known, often call for interpretation by the Courts. According to Mr. A. G. Davis, of Hull, in his paper on

The Statute Book: Some Criticisms and Suggestions, a reference to the Law Reports for last year shows that of the 145 English cases reported in the three series, 56, or nearly 40 per cent., dealt primarily with the interpretation of Acts of Parliament. The efforts of the Legislature have been frequently the subject of judicial criticism. The Income Tax Acts, the Public Health Acts, and, more recently, the Rent Restrictions Acts, are familiar examples. In *Hill* v. *Adershot Corporation* (1933, 1 K. B. 259; 102 L.J. K.B. 179), which Mr. Davis cites, Scrutton L.J. said of the Public Health Acts, "The present legislation, with the conflicting attempts to interpret it, is a disgrace to English legislation." Judicial criticism of the Income Tax Acts has been equally severe. But, to a large extent, the cause of defective legislation lies in the inherent difficulty of finding fit words to deal with the infinite variety of the subject-matter; a variety which may go on increasing while the words of the statute remain unchanged. And when amendments are made the result may be to produce fresh anomalies. Legislation, indeed, can rarely fit exactly the conditions with which it purports to deal. But this does not mean that the methods of legislation cannot be improved, and Mr. Davis suggests that there should be official examiners of Bills, charged with examining each Bill criticially and reporting on it. But even official examiners have not that "rear sight" which is often so much better than foresight, nor would a preliminary examination be sufficient. There would have to be another after the Bill had been amended. The paper was interesting and suggestive, but for the present interpretation is likely to continue to furnish plenty of work for the judges.—*L.J., 1936, p. 217.*

The Probation System.—Sir Rollo Graham-Campbell, chief metropolitan magistrate, recently paid tribute at a meeting at 45 Park Lane in support of the London Police Court Mission (which is now in its diamond jubilee year), to the work done by police-Court missionaries by means of the system of probation. According to the report in *The Times*, the speaker recalled that at the beginning of last century it was no uncommon thing for quite young offenders to be transported for long periods for trivial offences, and others were sent to prison for considerable periods. In 1876 the foundations of the present system of probation were laid. In the speaker's twenty-three years' experience as a metropolitan magistrate, he had found that probation officers were sympathetic, tactful, patient, hopeful, and firm if necessary. Many a man and woman, boy and girl, he said, now living honest, respectable lives would have gone under altogether but for the good offices of the police-court missionary under whose supervision they

had been placed. It may be of interest to recall in this connection some figures illustrative of the recent growth of the probation system and of the extent to which it is now employed. In 1933 nearly 19,000 persons were placed on probation. Of these 119 persons were placed on probation by the Courts of Assize, compared with five in 1910, although the total number of convicted persons was considerably greater in the earlier year. In the Courts of summary jurisdiction in England and Wales the percentage of those found guilty of indictable offences and placed on probation was eleven in 1910 and nineteen in 1933, corresponding figures for the juvenile Courts being 26 and 54. It may also be recalled that the Departmental Committee of Social Services in Courts of Summary Jurisdiction in its report, which was referred to in this column in our issue of the 4th April, last, while adverting to the desirability of the probation service being organised on a wholly public basis, recognised the scope which exists for the co-operation of the missionary services in the social services of the Courts and the value of the assistance to the probation officer in individual cases capable of being rendered by voluntary help provided it is carefully supervised.—*S.J., 1936, p. 921.*

Matrimonial Causes: Conciliation.—Mr. Claud Mullins recently addressed a letter to *The Times*, in which he urged the desirability of some conciliation machinery being available in all Poor Persons divorce cases. He referred to the report of the Police Court Social Services, whose recommendations on this point were alluded to in these columns in our issue of 4th April last, and to the new Marriage Bill which at the time of writing is on the eve of its second reading. Early next year, the writer stated, it was probable that the unanimous recommendations of this committee about reforming the procedure of these Courts when dealing with marriage cases would be laid before Parliament. When these reforms had been carried out, was there not an unanswerable case for including in the new conciliation machinery all "Poor Persons" divorces? "Conciliation", the letter states, "does not mean the denial of legal rights. It does not mean the coercing of parties to live together in conditions that have become unbearable. Conciliation does mean, however, the provision for those who cannot afford professional advice of the help of experienced and sympathetic people who will, if the parties wish it, examine into the whole situation and try to get the parties to look all round before taking a step that may be final, both for themselves and their children". Allusion is made to the value of conciliation procedure in the police Courts, with the suggestion that it is both illogical and socially dangerous that when the same type of person seeks a

divorce only legal assistance is provided. Before lawyers are allotted, the possibilities of conciliation should, it is urged, be investigated. Conciliation, as the letter emphasises, does not mean the denial of legal rights, and it is important that the truth of this proposition, if the system were extended as suggested, should not be belied in practice. Mr. Leo Page, in his "Justice of the Peace", which was recently reviewed in this journal, states that no machinery should be set up so as to prevent a wife from having access to a magistrate to ask for a summons. "No probation officer, magistrate's clerk or other person," he writes, "should ever be authorised to inform a wife, openly or by implication, that a summons will not be granted. This has, in fact been done far too often". The problem is how to effect a wise compromise. On one hand it is wrong, the writer intimates, to set up so rigid a barrier as to shut out a wife from access to the relief which the law provides; on the other hand, it is a mistake to allow too ready an approach, because reconciliation is, in practice, found to be less probable once a case has reached the stage of a public appearance of the parties in Court.—*S.J., 1936, p. 922.*

The Law of Libel: New Bill.—It is of some interest to note that a Bill to amend the law of libel has recently been presented in tho House of Commons by Mr. Samuel Storey, a former president of the Newspaper Society, with the support of Major Astor, Chairman of The Times Publishing Company, and Mr. W. W. Astor. The terms of the Bill, which are similar to that placed before the Empire Press Union Conference by Mr. Kenneth Henderson last June (80 Sol. J. 494), provide that no action for libel published after the passing of the Bill shall lie without proof of actual damage unless the words complained of (*a*) impute to any girl or woman unchastity or adultery, or (*b*) charge the plaintiff with having committed a criminal offence which is punishable corporally (the phrase includes imprisonment) or impute that the plaintiff has an obnoxious contagious disease, or (*c*) are published of the plaintiff in relation to his or her office, profession or trade: Provided always that unless the judge certifies to the contrary a plaintiff shall not in respect of any action brought under the first and third paragraphs recover more costs than damages. We do not propose, at any rate at this stage, to comment upon the desirability or otherwise of a change in the law in the direction or to the extent suggested, but we would refer our readers to the paper entitled "Problems of the Law of Defamation in Relation to the Press, Literary Work and Broadcasting," which was read at the Provincial Meeting of the Law Society at Nottingham last September by Mr. Kidore Kerman, a report of which appreared in our issue of 3rd October, (80 Sol. J. 801).—*S.J., 1936, p. 923.*

Divorce for Desertion.—In the discussion which took place last week in the House of Commons on the Marriage Bill, by which it is proposed to make, *inter alia,* desertion without just cause a ground for divorce, reference was made to the fact that a recognition of desertion as a conjugal offence has been part of the consistorial law of Scotland since 1573, when an Act was passed in which this was spoken of as resulting from the doctrines of the Reformation. The Scottish legislature, however, at that time walked warily, for it required as a preliminary to the claim for divorce an action of adherence, that is, an action in which the errant spouse was called upon to resume co-habitation. If decree for adherence was granted, the church was called upon to admonish, and if necessary, to ex-communicate, the offender—a duty which, we are told, the church invariably declined; and then, if all warnings were disregarded, the action claiming divorce followed. By the Conjugal Rights Act, 1861, the preliminary action for adherence was abolished, and thereupon the action claiming divorce could be commenced if there was desertion without just cause for four years; but as is pointed out in the standard work of Professor Gloag and Professor Henderson, although the formality of the action of adherence has been dispensed with, the conditions necessary to obtain divorce are in substance unchanged, that is, the desertion must have begun and continued without the petitioner's consent and without sufficient cause; and the action will fail if it appears that the petitioner had no desire to resume cohabitation and did not avail himself of such opportunities as offered to effect a reconciliation. In a comparatively recent case, where it was shown that the husband had been in desertion for the necessary period, it was decided that the wife was entitled to a decree although he had, after that period, become insane and so remained at the date of the petition.—*S.J., 1936, p. 941.*

The Marriage Bill.—Brief allusion may be made to some other points of legal import raised during the debate on the Marriage Bill. With regard to the conciliation machinery in cl. 10, Mr. A. P. Herbert referred to the present position when an application for separation came before the magistrates, and said that where a party "wanted or thought she wanted a divorce, at once it passed out of the realm of the kindly domestic atmosphere of those courts and she could only go to the assizes or the High Court." The proposal was that not every magistrate, but magistrate selected by the Lord Chancellor, who would probably be in most cases stipendiaries, and a woman magistrate, should automatically hear, in the first instance all applications for divorce. Whatever, he intimated, happened to the substance of the clauses designed to effect this

change, he would be extremely sorry to see the spirit of them thrown out of the Bill. The Attorney-General thought that everyone would agree that conciliation machinery was desirable, but whether the clause as drafted would in fact attain that end, whether it was the best method of attaining that end, and whether the double procedure which it involved was really practical were, he said, matters which he thought it right to raise at that stage cl. 7, which proposed to abolish the decree *nisi* was one to which the same speaker could see very strong objections being raised, while cl. 12, which dealt with the right to ask witnesses as to whether or not they had committed adultery, might, in its present form, go too far, and he was not sure that after examination it would be found to be a wise change. Mr. W. P. Spens, who said that he had little or no experience of the division of the High Court that dealt with divorce, but practiced regularly in the division that dealt with after math, urged that it was most important that the House and the country should realise what was the real problem which arose from the increase of facilitated divorce—namely, the children of divorced couples. He deprecated the proposed abolishment of the King's Proctor and the interval between the decree *nisi* and the decree absolute. The proposed scheme would, he thought, encourage collusive divorce. Lieut. Com. Agnew alluded to the difficulties and confusion which would arise as a result of the insertion of insanity as a matrimonial cause for divorce—a matter to which we have drawn attention in the past—as also to the difficulties like to be associated with proof in a Court of law of cruelty as defined in the Bill, but he welcomed strongly the new causes for nullity. The Bill was read the second time on the 20th November.—*S.J., 1936, p. 941.*

A *Homely Simile.*—In the Judicial Committee of the Privy Council recently, Lord Roche quoted Fuller's observation that "counsel were like bread, better when they were new, and not like beer, better when it was old". Such homely and forcible analogies are all too little heard in the Courts to-day. One of the most ingenious illustrations ever borrowed by the bench from common things was Mr. Justice Burrough's definition of a consequential issue. To the jury he said: "Perhaps you do not know what a consequential issue means, but I dare say you understand nine-pins. Well, then, if you deliver your bowl so as to strike the front pin in a particular direction, down go the rest: just so it is with these counts; knock down the first and all the rest will go to the ground. That's what we call a consequential issue". Homely, too, was the metaphor with which Chief Justice Jeffreys quelled an advocate who had ventured to repeat once too often an ingenious argument.

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"You cannot lay an egg but you must cackle over it," said Jeffreys.—*S.J., 1936, p. 950.*

The "Russell Rule" and Nullity Cases.—In *Farnham* v. *Farnham*, otherwise Daniels, which was disposed of by Mr. Justice Langton on Friday of last week, the facts were quite shortly as follows: The parties went through a ceremony of marriage in April, 1933, and in September of the same year the respondent wife left the petitioner and did not thereafter return to him, although in August, 1935, she gave birth to a child. Assuming, said his Lordship, that all the evidence tendered was admissible, he found that the marriage of 1933, had never been consummated, because the respondent was incapable with regard to the petitioner, and the question for consideration was how much (if any) of the evidence tendered was excluded by reason of the rule in *Russell* v. *Russell* (1924), which precluded a spouse from giving evidence in divorce proceedings which tended to bastardise a child born in wedlock. Such evidence, it will be recalled, had always been excluded in legitimacy declaration suits, but in the Russell case Lord Birkenhead, L.C., and Lords Finlay and Dunedin, held evidence negativing marital intercourse inadmissible in divorce proceedings, whilst Lords Sumner and Carson dissented. Dicta of Lord Mansfield were quoted with approval by Lord Birkenhead in his opinion in that case, as also a dictum by Lord Halsbury, L.C., in the *Poulett Peerage* case (1903). In *Goodright* v. *Moss* (1777), Lord Mansfield's words were: "The declarations of a father or mother cannot be admitted to bastardise the issue born after marriage", whilst, in a second passage, his Lordship added: "It is a rule founded on decency, morality, and policy, that they shall not be permitted to say after marriage, that they had had no connection, and, therefore, that the offspring is spurious."—*L.T., 1936, p. 401.*

The Judgment.—In an interesting judgment, Mr. Justice Langton said that without the guidance of the majority opinions in the *Russell* case (*sup.*), he would have interpreted Lord Mansfield's words that parents' declarations "cannot be admitted to bastardise the issue born after marriage", as excluding only declarations tendered "with the object of bastardising," and not those tendered for purposes the attainment of which would not have a legal effect on a child's legitimacy. In view, however, of the dicta referred to, that clear line of distinction was not available. There was no recorded instance of an application of the "Russell rule" to a nullity suit. The result of applying the rule in the present instance would be that a man would be prevented from proving

that his marriage was never consummated by the fact that his wife had borne an illegitimate child. It was clear that the "Russell rule" was arrived at with a full consciousness of the practice in nullity suits, and with a plain belief on the part of those who declared it that they were in no way departing from the practice or attempting to minimise the rights of parties to such suits in the manner indicated, and he (his Lordship) therefore pronounced a decree *nisi* of nullity. We hope to consider the judgment more connectedly and at greater length very shortly.—*L.T., 1936, p. 401.*

Some Bordering Cases.—As noted above, before the Russell decision in 1924, the rule excluding a parent's evidence of the kind in question was thought not to apply to divorce proceedings, and in them such evidence was freely received. In 1925, in *Fosdike* v. *Fosdike and Hillier,* it was held that the rule did not apply in the case of a miscarriage, whilst in the same year the decision in *Holland* v. *Holland* showed that it had no application where the child was still-born. In the Russell case, Viscount Finlay had said that " unless there is a child . . . the rule never comes into play at all, whilst of the still-born child in the Holland case, Mr. Justice Swift said: " It never had any civil rights . . . it could not be the subject of an order under the Bastardy Acts, and for all the purposes of the law it was as though it had never been produced." The rule might not apply, it is suggested in Brown and Latey on Divorce, if the child lived, say, for only six months, and was no longer living at the date of the trial, though this view of the matter and the cases just cited hardly seem to found the rule on the " decency, morality, and policy " of Lord Mansfield. Long ago, in settlement cases, it was held that where there had been a judicial separation, a spouse could give evidence of non-access even in a legitimacy case, whilst in *Andrews* v. *Andrews* (1924) the view was taken that when spouses had been judicially separated, whether by a decree of the Divorce Court or by a Justices' order, the rule had no operation. In *Mart* v. *Mart* (1926) it was contended that the Court could not look at a deed of separation because to do so would offend against the Russell rule; but Mr. Justice Bateson there held that this was not so, and that if it were right that a judicial separation destroyed the presumption of cohabitation, a deed must be equally effective to do so. An oral agreement might possibly be regarded in the same way, but proof of an implied agreement to live apart might approximate very closely to proof of non-access.—*L.T., 1936, p. 402.*

Chief Justice of India.—Although ever since the British occupation of the great eastern dependency in the later years of the eighteenth century there has been a succession of Chief Justices in India—one for each of the states—the appointment has now been made for the first time, under the provisions of the Government of India Act, 1935, of a Chief Justice of India, and, as has been announced, the choice of His Majesty to fill this new and High Office has fallen upon Sir Maurice Gwyer, K.C. After a distinguished academic career, Sir Maurice has filled a number of important Government posts, including that of Solicitor to the Treasury and Parliamentary Counsel to the Treasury, and no doubt the experience thereby gained, as well as by his work in editing Anson's classic treatise on the "Law and Custom of the Constitution," will prove of distinct value in the discharge of the onerous, and, some of them, novel, problems with which he will be confronted when he actually begins his new duties in the East.—*S.J., 1936, p. 981.*

The Federal Court.—This tribunal of which Sir Maurice will be the chief is set up by the statute to which reference is made in the preceding paragraph, and is normally to sit in Delhi, although it may sit "at such other place or places, if any, as the Chief Justice of India may, with the approval of the Governor-General, from time to time, appoint." The Court is invested with both original and appellate jurisdiction. Generally speaking, it is given original jurisdiction, to the exclusion of any other Court, in disputes between any two or more of the following parties, that is to say, the Federation, any of the provinces, or any of the federated states, if and so far as the dispute involves any question (whether of law or fact) on which the existence of a legal right depends. In the exercise of this original jurisdiction no judgment other than a declaratory one, is to be pronounced. By virtue of its appellate jurisdiction the Federal Court can entertain appeals from the decree or final order of a High Court in British India, if the latter tribunal certifies that the case involves a substantial question of law as to the interpretation of the Act of 1935, or any order in council made thereunder, and then follow these important words: "And it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved, and of its own motion to give or to withhold a certificate accordingly". Power is given to the Federal Legislature to enlarge this appellate jurisdiction in civil cases where the amount involved is above a named sum. Conceivably, the extensive powers with which the Court is invested may tend to minimise the number of appeals to the Judicial Committee of the Privy Council, but appeals to the latter tribunal are not shut out, being allowed specifically in

matters concerning the interpretation of the Act of 1935, on certain other constitutional questions, and "in any other case, by leave of the Federal Court or of His Majesty in Council." The veneration of the Indian people for the Privy Council has always been noticeable, and it found expression long ago in the act of remote tribesmen who were found offering sacrifice to a far-off but powerful god who had just restored to them certain land which the Government had taken away, and on being asked the name of the deity to whom they were offering their oblations, they replied: "We know nothing of him but that he is a good god, and that his name is the Judicial Committee of the Privy Council!"—*S.J., 1936, p. 981.*

The Marriage Bill.—A Standing Committee of the House of Commons considered the Marriage Bill on 3rd December, when the inclusion of its first clause was sanctioned. The attitude of the Government was explained by the Attorney-General, who intimated that a decision had not been taken on the Bill or on the various points of policy which were raised by the different clauses. Sir Donald Somervell said, however, that he and the Solicitor-General were there to assist the committee on technical points. Some discussion took place on an amendment to reduce from five years to three the period from the date of a marriage within which no divorce can, according to a provision of the Bill, be granted. Mr. A. P. Herbert said that the promoters of the Bill were anxious that the clause should not be whittled away, because if that were done there would be little value left in it, and another speaker alluded to what was declared to be the strong feeling in the country that the clause should be retained, there being, it was said, no doubt that a great many people entered into marriage with the idea that if they did not like it they could get a divorce. Mr. A. M. Lyons viewed the matter in light of the restriction which the introduction of a statutory period would impose on access to the Court. It would, he said, be an innovation to take away for a period the right of people to go to Court for recognised relief. The Bill would mean that, for the first time in history, parties were going to be prevented from going to Court. He expressed the hope that the period would be made as short as possible. The amendment was withdrawn. It should, perhaps, be explained that during the specified period of five years, applications for judicial separation and other relief, including declarations of nullity, remain unaffected.—*S.J., 1936, p. 982.*

Involuntary Bailees in Literature and in Law.—Of the men of letters of the past generation few equalled Andrew Lang in the versatility of his interests, in the delightful allusiveness which

marked all that came from his pen, his delicate humour, and that quality which the eighteenth century happily called a "pretty wit." Of this last mentioned endowment one of the most amusing exemplifications was, on receiving from his friend Robert Louis Stevenson the lines beginning, " Dear Andrew with the brindled hair," his apt riposte, "Dear Louis with the blooming cheek!" That, however, was only one of the many manifestations of his ready wit and gay humour. Being a bookman to his inmost fibre, his writings make their primary appeal to the lover of literature, and the lawyer, as such, will find him rarely embarking on the consideration of a legal topic, but in his Lost Leaders, which the present writer has recently been re-reading after many years, with renewed delight, the paper headed, "Involuntary Bailees," touches a subject at once legal and literary. For the benefit of those unacquainted with the subject he explains that "when someone you meet at dinner recommends to your notice a book (generally of verse), and kindly insists on sending it to you next day by post as a loan, you are an involuntary bailee. You have the wretched book in your possession; no inducement would make you read it, and to pack it up and send it back again requires a piece of string, energy, brown paper, and stamps enough to defray the postage. Now, surely no casual acquaintance or neighbour for an hour at a dinner party has any right thus to make demands on a man's energy, money, time, brown paper, string, and other capital and commodities." Those who would thus thrust their wares upon the unhappy bailee are, he says, commonly a minor poet, who sends his tragedy on John Huss, or a writer on mythological subjects, anxious to weary you with a theory that Jack the Giant Killer was Julius Cæsar; and so on he continues in his inimitable fashion so widely removed from what some would call the dryasdust lucubrations of the legal writer in discussing the same topic.—*L.T., 1936, p. 452.*

A Notable Involuntary Bailee.—Among the many eminent men who have suffered at the hands of bailors pushing their so-called literary wares, was Sir Walter Scott. To a friend he narrated the misfortunes that befell him in the spring of 1819. A bulky parcel was delivered to him which looked so important that he imagined it had travelled under some magnificent frank like the First Lord of the Admiralty's, but on opening it he found, to his dismay, the contents to be a manuscript play by a young lady of New York, who kindly requested Scott to read and correct it, equip it with a prologue and epilogue, and procure for it a favourable reception from the manager of Drury Lane. On examining the cover Scott found that he had been charged £5 odd for postage. This was bad enough, but worse was to come. A fortnight later a second

package of the like bulk was delivered at Abbotsford, and Scott was absent-minded enough to break its seal without examination; when he did so out jumped the same identical tragedy with a second epistle from the authoress who mentioned that as the winds had been boisterous she feared that her former communication might have foundered, and, therefore, she judged it prudent to forward a duplicate.—*L.T., 1936, p. 452.*

Peter Pindar's Contribution to the Law.—John Welcot, better known by his pseudonym Peter Pindar and famous or notorious by the virulence and multitude of his satires, all unwittingly and after his death contributed to the elucidation of the law as to involuntary bailment. How this came about is narrated in the case of *Lethbridge* v. *Phillips* (1809), 2 Starkie 544, where we read that the plaintiff, described as a "very eminent painter in miniature" painted a portrait of Wolcot shortly before the latter's death. One Barnard, seeing this, expressed a wish that he might be allowed to show it to the defendant, Sir Richard Phillips, the proprietor of the Monthly Magazine, and the "vegetarian editor" depicted by Borrow in his "Lavengro". In fact, Barnard obtained the portrait and handed it to the defendant's son, who took it home ostensibly to be shown to his father. Apparently the son did not appreciate the fragility of the miniature and thoughtlessly placed it on a mantlepiece close to the stove, per quod the miniature was seriously damaged. In respect of this the plaintiff sued the defendant, but as it appeared that the latter had never asked to be shown the portrait, or indeed knew that it had been brought to his house, the action failed. Chief Justice Abbott pointed out that the defendant, without his knowledge and consent, could not be considered as a bailee of the property; in other words, the defendant was an involuntary bailee who was not to have a legal obligation thrust upon him against his knowledge and will.—*L.T., 1936, p. 453.*

The "Russell Rule" Again.—On Wednesday of last week, in *Stafford* v. *Kidd*, the Court allowed a Poor Person's appeal by way of case stated from a decision of Sunderland justices. The question raised was whether a deed of separation had the same effect as a judicial separation in getting rid of the presumption of legitimacy and allowing evidence of non-access to be given in bastardy proceedings by the wife, although such evidence would tend to bastardise the child. The facts were quite shortly as follows: Ann Stafford married in May, 1922. In November, 1934, the parties separated and signed a deed of separation, and in December, 1935, the husband filed a divorce petition

in which he named William Kidd, the present respondent, as co-respondent. A child was born in March, 1936. The husband was granted a decree *nisi* in June, 1936, and no mention was made of the child born three months earlier. At a Court of summary jurisdiction at Sunderland a complaint was preferred by Ann Stafford that she had been delivered of a male bastard child, and that William Kidd was its father. The respondent, Kidd, was not called upon, and the justices came to the following conclusions of law: (1) That evidence of non-access was a condition precedent to the appellant's proceeding with her case; and (2) that a deed of separation containing self-imposed obligations had not the same effect as a decree of judicial separation or a separation order in reversing the presumption of access and legitimacy, and that therefore the appellant was bound by the rule in *Russell* v. *Russell*, (1924), and non-access must be proved by independent testimony. They found as a fact that non-access had not been so proved, and they accordingly dismissed the complaint.—*L.T., 1936, p. 459.*

The Earlier Cases.—The Lord Chief Justice (Lord Hewart), in giving judgment in the above case, said it had been contended that the effect of the separation deed was not indeed of itself to establish non-access, but to get rid of the presumption of legitimacy, and so enable the appellant to give evidence. Where the justices right in holding that the deed had not that effect, and that *Russell* v. *Russell* (*Sup.*) prevented the appellant from offering evidence of non-access? In 1925, *Mart* v. *Mart*, came before the late Mr. Justice Bateson, and in that case reliance was sought to be placed on a deed of separation to get rid of the presumption. In that case Mr. Justice Bateson said unambiguously, "It has been decided that where there has been a judicial separation it is presumed, in the absence of evidence to the contrary, that there has not been access between the spouses after the date of the decree, and that, therefore, where a child is born more than nine months after the date of the decree, the presumption of legitimacy does not arise. I think that a deed of separation has the same effect". That was in 1925. Five years later *Rimmer* v. *Rimmer* (1930) came before Mr. Justice Hill, who said of the presumption of legitimacy: "There was nothing in a mere order for maintenance—and there was no proof of an agreement to live apart—to negative that presumption," plainly implying that if there had been an agreement to live apart, that would have decided the matter. So much for the authority on the one side. But it was said that *Re Bromage* (1935) was a still later case, and there the competing view was adopted. In that case, however, the topic was only "faintly mentioned," nor was there any argument upon

it. The decision was based on *Morris* v. *Davies* (1837) and the *Aylesford Peerage* case (1885)—before the Matrimonial Causes Act, 1857—whilst to the present case the chronology made an important difference, and the more recent cases were here the truest guides.—*L.T., 1936, p. 459.*

The Decision.—Counsel for the respondent had, his Lordship continued, criticised the terms of the deed in that it was to continue in operation only so long as the wife continued chaste, and therefore, it was contended, the husband might be entitled to treat it as terminated. But a *dum casta* clause was common form in separation judgments and orders, and the contention had no validity. For the reasons mentioned above, he thought the justices were wrong in deciding that a separation deed did not in this connection have the same effect as a judicial separation, but he (his Lordship) confined his judgment in the present case to deciding that the separation deed was sufficient to get rid of the presumption of legitimacy. Mr. Justice Swift and Mr. Justice Macnaghten agreed, and the appeal was allowed. Now there is no doubt as to the trend of the cases in this matter. Of the majority decision in the Russell case, it is said in Browne and Latey's "Divorce" that its practical inconveniences and hardships have so manifested themselves that "Divorce Judges have ever since readily welcomed any loophole of escape". Only a couple of weeks ago we were noting in these columns the decision in *Farnham* v. *Farnham* (*ante*, p. 401), in which it was held that the rule should not be applied in a nullity case. There we suggested that even an oral agreement to live apart might have the same effect as a judicial separation or deed. At any rate, in *Rimmer* v. *Rimmer*, (Sup.) Mr. Justice Hill said he had had nothing but the evidence of the husband and wife as to access, and that "there being . . . . . . neither separation order nor agreement to live apart," that evidence was not admissible. Difficulty might occur where evidence of continuous non-access was the sole evidence of an implied agreement to live separate.—*L.T., 1936, p. 460.*

Lord Campbell.—Among those the brilliancy of whose later achievements adds an interest to their earlier efforts must be mentioned Lord Campbell. In his legal youth he busied himself in many directions, doing theatrical criticism for one of the morning journals, and on one occasion narrowly escaping journalistic disaster by writing a critique of a play that was billed for production but for which another was substituted at the last moment, without the knowledge of Campbell until it was almost too late,

but meanwhile he was professionally making a name for himself by his volumes of reports of Lord Ellenborough's *nisi prius* decisions. In these he introduced what was then regarded as startling innovation, namely by appending to each report the names of the attorneys for each of the parties—a departure from use and wont which he justified in a foot-note to the first of the cases reported in these terms: "As the statements of pleadings and of facts in these notes must often be imperfect, and may sometimes be in accurate. I have thought it right to subjoin the names of the attorneys on both sides from the Chief Justice's paper. Thus, upon any doubt arising, the briefs in the cause may be easily inspected and an opportunity is given to verify the report or to rectify the mistakes with which it may be chargeable." Throughout his long carrier Campbell was never without his critics. His later biographical works were said to have added a new terror to death; but even in his earlier days as a reporter there were those who maintained that the reason for inserting the names of the attorneys at the end of the reports was simply to ingratiate himself with that branch of the Profession.—*L.T., 1936, p. 487.*

Ellenborough's Bad Law and Campbell's Reports.—Lord Chancellor Harcourt, we are told, having given mortal offence to Vernon the Reporter, the latter by way of reprisal suppressed the Chancellor's best decisions and gave only the doubtful ones, thus copying the practice of the Tory farrier who in shoeing the horse of a Whig took care to lame him. Campbell did not follow this evil example, but reported only those decisions of Lord Ellenborough which he deemed to be right, keeping what he called the Chief's "bad law" in a drawer in his chambers where they remained ensconced till the great fire in the Temple made an end of them as of so mnch else. Campbell tells us that he was flattered by hearing Sir James Mansfield saying, "Whoever reads Campbell's reports must be astonished to find how uniformly Lord Ellenborough's decisions were right", at which the reporter must have chuckled. Later judges of great eminence have, however, testified to the accuracy of Campbell as a reporter. Mr. Justice Blackburn, an austere man who had himself been a reporter, said, referring to Campbell's volumes, "we may depend upon the accuracy of this reporter," while Mr. Justice Maule said that "we have frequently found, in referring to the attorneys whose names are mentioned by the reporter at the end of the cases, that the real circumstances of the case explain the apparent anomaly of the decision."—*L.T., 1936, p. 487.*

Barnewall and his Coadjutors.—Just about the time when Campbell was laying down his reporting note book in view of the fact that he was now making a much larger income by his practice, Richard Vaughan Barnewall began his labours in the Court of King's Bench in conjunction with, first, Edward Hall Alderson, next with Cresswell Cresswell, and last of all with John Leycester Adolphus, and the numerous volumes which bear these names are familiar to every practising lawyer. It may be noted in passing that Dickens in Pickwick fails to give the proper spelling of the senior editor's name, making Mr. Perker refer "to the well-known case in Barnwell and—"which provoked the comment from Sam Weller, "Never mind George Barnwell; everybody knows what sort of a case his was, tho' it's always been my opinion, mind you, that the young 'ooman deserved scragging a precious slight more than he did". But to return to Barnewall, with the name correctly spelled, we find that two of his collaborators, Edward Hall Alderson and Cresswell Cresswell each reached the Bench. How it was that Barnewall did not attain the same position, we do not know, but if he did not become a judge, he at least reaped a remarkable reward from his volumes. It was said that when he had Cresswell as his colleague, each volume brought them £2000; that was a large amount in those days, and no doubt this handsome income consoled Barnewall to some extent for having to continue a reporter.—*L.T., 1936, p. 488.*

Other Victorian Reporter Judges.—As we look through the list of judges in the first half of last century it would almost seem that most of them had graduated as reporters; indeed, just as each private in the Napoleonic armies was assumed to carry in his knapsack a Marshal's baton, so every reporter in the Courts appeared to have in his notebook a patent for a judgeship. Thus, John Bernard Bosanquet, who collaborated with Christopher Puller in reporting the decisions of the Common Pleas, Exchequer Chamber and House of Lords, ultimately became a judge in the Court where he had pursued the humbler task of recording the decisions. Charles Crompton was another who in the same way "the lowliest duties on himself did lay" before he reached the Bench; and for a time he had as a colleague in his reporting work no less distinguished a lawyer than John Jervis, who later became Chief Justice of the Common Pleas, and in his private capacity horrified an extremely evangelical Clapham lady by telling her at her dinner table that he did not mind how drunk his coachman got on Sunday provided that he kept sober on weekdays. As already mentioned, Colin Blackburn was yet another who enrolled himself early in the reporter's calling, collaborating with Macaulay's friend Thomas

Flower Ellis, in the series of volumes that bear their joint names; and eventually became one of our most learned judges.—*L.T., 1936, p. 488.*

The Marriage Bill in Committee.—The career of the Marriage Bill in Committee has been uneventful, and has, indeed, been marked by a series of defeated amendments. One of them, which was to the effect that the word "persistent" should be inserted with reference to adultery as a ground for divorce, was put forward with the object of getting rid of the collusive divorce. Two opposers of this amendment urged that if the Bill became law, a more effective line in regard to collusive cases would be possible on the part of the Courts. Another speaker suggested that the first thing to do in amending the divorce law was to strike out all the paraphernalia of the collusive letter before the case was brought, then the collusive petition and the unknown woman. They saw, he said, the whole fraud on the judiciary all over the country, and he hoped that the collusive divorce would be stopped. Public opinion was against this form of divorce and the Bill as it stood gave further opportunities for this fraud to be perpetuated. This view of the Bill did not commend itself universally to the Committee, and another member, who urged that public opinion was thoroughly hostile to collusive divorce, thought they might well believe that if the bill became law it would be a prelude to a great decrease in divorce, especially that of a collusive character. Amendments to delete the clause providing as a ground for divorce desertion over a minimum of three years, and to vary this period, were defeated, as was also a further amendment to the effect that desertion should not be regarded as a ground for divorce if the deserted party had received maintenance or a settlement. As to the last proposal, Mr. A. B. Herbert, for the promoters of the Bill, said that while they wanted to take all precautions to see that the courts ascertained the facts, they could not bind the Courts so severely as the amendment proposed. Another speaker urged, moreover, that so far as collusion was concerned, the amendment would not add to the existing law, nor would it assist the Courts to detect deception, while it might inflict great hardship on woman and children for no reason whatsoever.—*S. J., 1937, p. 1.*

Cruelty and Insanity as Grounds for Divorce.—A motion to delete the passages in the Bill making cruelty a ground for divorce on the ground that the definition was too wide, coupled with the suggestion that provision should be made at a later stage in regard to the grosser forms of cruelty, was withdrawn on an assurance

being given that an opportunity would be afforded later for a full discussion of the definition of cruelty. A motion to delete the provision to that effect that incurable insanity after a respondent has been certified a lunatic for a period of at least five years preceding the petition shall constitute ground for divorce was like-wise defeated. We have ourselves drawn attention to the difficulties to which such new grounds for divorce are likely to give rise. The speaker who moved deletion of this provision considered that the proposals of the Bill were a weakening of the position and that the necessary safeguards by the Lunacy Commissioners would be lacking. Persons after five years might recover from insanity and much greater safeguard than was provided in the Bill was required. He himself was very doubtful whether a person ever was incurably insane. Another speaker thought that public opinion was in favour of maintaining the obligation of the marriage tie and was not in favour of whittling it away at the will of some new statutory designer. Experiments of this nature were fraught with a new danger. A third speaker suggested that the period should be increased from five to ten years. The Committee adjourned on 15th December until after the Christmas recess.—*S. J., 1937, p. 2.*

The Fees of Junior Counsel.—One of the matters which the Council had under consideration during the year in question was the inadequacy of the remuneration of junior counsel for preliminary work. On the 8th July last the Chairman wrote, on behalf of the Council, to the Lord Chancellor asking for his Lordship's help in obtaining "an improvement which is much overdue in the remuneration of junior counsel for drafting and advising." The letter quoted the report of the London Chamber of Commerce, made as long ago as 1930, in which it was said that "under the present system junior counsel before trial fulfil most onerous and responsible tasks, such as advising on the merits of the case and on the nature of the evidence to be called on the trial, which at present is underpaid". When the Bar Council were asked by the late Lord Chancellor (Lord Sankey), in connection with his Lordship's efforts to reduce the cost of litigation, to modify the two-thirds rule, they referred to the inadequate figures for preliminary and interlocutory work, but admitted that conditions were not then propitious for making a change. In their letter of the 8th July last the Council ventured to think that conditions had become "more propitious". They recognised the difficulty of indicating precisely what the quantum of increase should be, and suggested that the existing inadequacy arose to a considerable extent from the practice in

taxations of allowing a "perfunctorily fixed fee for pleadings and other interlocutory work". The belief was expressed that greater adequacy would follow a direction by the Lord Chancellor that taxation of fees ought not to be made "the subject of any fixed practice or limits," but that a reasonable fee should be allowed in each case after regard had been paid to "the difficulty, length, and complexity of the subject matter, and other circumstances of the case, including among such circumstances the fees (if any) paid on briefs at the hearing".—*L. T., 1937, p. 19.*

BOOK REVIEWS.

INTERNATIONAL LAW by Mr. K. R. R. Sastry, M.A., M.L., Advocate and Reader, Allahabad University, Allahabad. Price Rs. 5.

Unlike the Madras University, the University of Allahabad recognises International Law as one of the subjects for the LL.B., and Mr. K. R. R. Sastry is a Reader of that University in International Law. The subject has not received in India the attention adequate to its importance and we welcome this very first venture by an Indian to deal comprehensively with the subject. The book has been commended by Professor Garner who contributes the foreword. We have no hesitation in agreeing with him. It is a meritorious performance, not uninteresting to scholars and of immense use, we have no hesitation in saying to students interested in that branch of law. There is nothing like saying the last word in any branch of law and it is specially so in International Law which is law only by courtesy and in fact is a body of growing usages with more or less imperfect sanction and even a mere up-to-date statement of the diverse points of view in their historical sequence is sure to be of great help in the growth of the law. The author has dealt with the subject in a very lucid and interesting manner and the chapter on international waterways opens out a comparatively unexplored ground. We note with pleasure that the author has made some illuminating references to the treatment of this subject in ancient Hindu legal literature not usual in treatises on International Law. We are hopeful of fuller research in that line yielding in the hands of competent scholars, results not merely of historical interest but which may considerably help the growth of the law itself.

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THE PROPOSED INSURANCE ACT OF 1937 *

BY
WATRAP S. SUBRAHMANIA AIYAR, B.A., B.L.

The present is an attempt to codify the law relating to the business of insurance which was contained in various enactments. It deals with four kinds of insurance: (1) Life; (2) Fire; (3) Marine; and (4) Accident and Miscellaneous Insurance including Workmen's Compensation and Motor Car Insurance. Part 3 of the enactment deals with the subject of Provident Insurance Societies. As soon as this enactment is passed, the various independent statutes, such as, The Provident Insurance Societies Act, 1912; The Indian Life Assurance Companies Act, 1912; and The Indian Insurance Companies Act, 1928, will be repealed.

The main subjects with which the new enactment deals are, the amount of compulsory deposit Insurance companies should have with the Government, and the accounts and other documents which external Insurance companies should keep concerning their business in India by which the returns concerning that business can be checked. An important deviation from the previous Insurance Acts is the doing away with the institution of managing agents. S. 25 states that no insurer shall after the commencement of this Act appoint managing agents for the conduct of his business. This, of course, is in unison with the policy adopted in respect of all companies in the Indian Companies Act, which preceded the present. The incorporation of the law relating to the Provident Societies in part 3 of the enactment necessitates a separate provision as to the formation and the winding up of the societies.

An important circumstance to be taken notice of is the need for every Insurance company to get itself registered. The provisions with respect to registration fix a minimum paid up net working capital. Of course, companies doing the other three kinds of insurance have necessarily to provide sufficient capital to enable them to carry on those other kinds of insurance. This condition is not insisted on in respect of older companies. The rule as to compulsory initial deposits applies also to the older companies. S. 23 of the Act also makes it obligatory on every company to invest not less than $33\frac{1}{3}$ per cent. of its assets in Government securities. It is very difficult to say whether after all some of these provisions may not work against the formation of deserving indigenous companies. It is also a matter for consideration whether even in the case of companies which can afford to keep a fairly large sum as deposit, to insist upon such large compulsory investment will not lead to the company having an unduly large percentage of its funds in securities which yield but a poor rate of interest.

The provision that no loans are to be granted on hypothecation or on personal security to directors or managers or officers of an Insurance company or when the insurer is a firm to any partner therein or to any other company or firm in which such director or manager or officer has any such connection seems to be unexceptionable. They will have only the right to take loans on their policies just as any other insurer can. This will secure insurance monies from being lost by the influence of—it may be—well-meaning insurers.

The Act again imposes a restriction as to the amount of commission, etc., to agents for the purpose of procuring business. No insurer can pay, after the Act, an insurance agent by way of commission anything more than 40 per cent. of the initial premium and 5 per cent. on the renewal premiums. It is very common knowledge that policies cannot be procured in any but the actual place where the company has got its head office on anything like 40 per cent. of the first year's premium by way of commission. Even in the case of companies which are fairly well to do and which have a good history of capable management to rely upon, it is often found necessary to give by way of commission as much as 65 per cent. of the first year's premiums in new areas. No Insurance company normally is

likely to pay a higher commission than is necessary. A statutory rule that 40 per cent. is the highest commission that can be offered to insurance agents is something which many an Insurance company especially those starting business must find it difficult to keep up to. Naturally the companies will have to discover other ways to improve the condition of the agents if the rule is to be retained. The Act also prescribes a condition as to licensing of insurance agents. It is much to be doubted whether knowing as we do the sort of people that take to insurance agency and the rather poor way in which they get on, it will be found possible to insist on the provisions as to licensing of insurance agents.

The provisions relating to foreign Insurance companies making compulsory deposit and as to their keeping accounts with respect to their Indian insurance business are quite sound and are much to be appreciated. It is but proper that Insurance companies which make a good lot of Indian business must deposit a substantial portion of the money got in India in Indian securities. Ss. 3 (3) and 48 of the Act rightly impose disabilities on non-Indian companies on the principle of reciprocity. It is a well-known fact that in several countries various disabilities are imposed upon foreign insurers. Therefore wherever a foreign Insurance company wants to transact business in India the dictates of justice require that it must not be allowed facilities in this country which the country of their domicile deny to Indian companies.

Ss. 31 and 32 of the Act provide for the assignment or transfer of policies, and for nominations. In giving effect to nominations, there is a departure from the rule as understood at present. Nominations are given effect to, while not interfering with the power of the policy-holder to transfer.

There is no provision as to the way in which the business of companies is to be transacted and managed. The Act is also silent as to the existence of policy-holders' directors in companies which are mainly shareholders' companies. It was fondly expected that the Act will make provision with respect to companies where the number of shares is comparatively small and the amount which has been contributed equally small. The Act should contain sufficient safeguards to see that the shares are not cornered and that independent directors

take part in the management throughout. After all, as the Law Member observed, the provisions embodied in the Bill do not represent the final and unalterable view of the Government. An important omission like this should be rectified. While it may be admitted so far as foreign Insurance companies are concerned that the provision as to deposit, keeping of accounts, etc., are all for the good, it must, at the same time, be confessed that there has not been any serious endeavour on the part of the legislature to introduce conditions which might facilitate the growth of healthy indigenous companies.

JOTTINGS AND CUTTINGS.

Crime: Increase in Juvenile Offences.—Sir Alexander Maxwell, Deputy Under Secretary of the Home Office, made some interesting and informative observations concerning the prevalence and incidence of crime some ten days ago when he addressed members of the Howard League for Penal Reform at a meeting held at the Comedy Restaurant, London, at which Mr. Claud Mullins presided. Statistics, he said, offered no ground for the idea that crimes of violence had been increasing in recent years. During the last twenty to twenty-five years there had been no increase in such crimes; on the contrary, the general tendency had been towards a decrease. The speaker drew attention to the fact that a large proportion of persons found guilty of crimes were young people, the most recent figures showing that one-third of the offenders were under seventeen years of age, and nearly one-half under twenty-one. Youth, he said, had always been more lawless than age, but it was noteworthy that while the number of young persons brought before the courts had been increasing in recent years there had been no corresponding increase among adults. The increase of offences by juveniles—dishonesty was cited as a class of offence now less common among adults but more common among juveniles—was, it was intimated, marked by a steep rise after the passing of the Children's Act in 1933, which was followed by another in the following year. It was pointed out that a similar increase occurred after the passing of previous Children's Acts, which had resulted in a greater tendency to charge children and, it was thought, must be attributable to some extent to the vigilance displayed by the police and other authorities in discovering child offenders. It was emphasised that the tendency to increased lawlessness among children was not reflected in the figures for adults—a fact which made it clear that children did not persist in their offences when they reached adult life and, it was urged, showed that the method of the courts in dealing with them had been very largely effective.—*S.J., 1936, p. 825.*

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ADOPTION BY HINDU WIDOW AND SAPINDAS' CONSENT.

The Hindu law of adoption is evolved from a very few texts of Smritis and, in consequence, the solution of many a practical problem largely depends on the Judges' ideas of what is right and proper, checked and regulated, no doubt, by the recognised principles of Hindu law relating to property and to a considerable extent also by the rules of Hindu religion. It is our endeavour here to trace briefly the nature and history of the doctrine which obliges a Hindu widow in the Madras Presidency to obtain the assent of her husband's sapindas before making an adoption and then to study the results of the doctrine in the field of law.

The power of a widow to adopt a son to her husband is derived from a text of Vasishta:

न ह्येकं पुत्रं दद्यात्, प्रतिगृह्णीयाद्वा ।
स हि संतानाय पूर्वेषाम् ॥
न स्त्री पुत्रं दद्यात्, प्रतिगृह्णीयाद्वा
अन्यत्रानुज्ञानाद्भर्तुः ॥

of which the last two lines mean 'nor let a woman give or accept a son unless with the assent of her lord". Boudhayana also declared the law to the same effect.

This text is variously interpreted by different schools of Hindu law. While the Mithila School prohibits altogether adoptions by a widow on the ground that according to the text the assent of the husband must be obtained *at the time of adoption*, the Bombay School views that the text

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is applicable only to adoptions by a woman made *during her husband's lifetime* and that it leaves the widow free to adopt in the absence of her husband's express prohibition. Again, while the Benares School thinks that a widow can adopt provided she previously obtained the *positive assent* of her husband during his lifetime, the Madras School allowed her to make an adoption *even by securing the consent of her husband's sapindas.*

This view of the Madras School is based on the assumption that the word भर्तुः used in the text is merely illustrative and includes the guardians of the widow for the time being, so that the assent of the husband's sapindas who are presumed to be the widow's guardians is sufficient to enable her to make an adoption. But it is a rule of the Mimamsa which is always acted upon in the interpretation of the Smriti law that if words can be understood in their primary sense they should not be construed in a secondary sense. The word भर्तुः means and specifies only the husband and any construction of the word based on its etymological meaning in order to include the husband's sapindas will be strained and far-fetched. Further, this interpretation overlooks the basic principle underlying Vasishta's injunction under which the duty is imposed upon the woman obtaining the consent of her husband. The act of adoption is intended solely for the benefit of the husband, *viz.*, to serve his spiritual and temporal purposes, and it is therefore for him and not for the wife to decide whether or not he should take a boy in adoption. The widow in making an adoption would only be acting as the agent of her husband. The sapinda can therefore have no place either to aid or to impede in the fulfilment of the purposes of adoption.

What then are the positive authorities or texts on which this theory of sapindas' consent has been sought to be founded by the judicial tribunals in Southern India and eventually by the Privy Council? It is interesting to note that the Mitakshara and Parasara Madhavya are silent on the matter. The 'Smriti Chandrika' of Devanda Bhatta declares only that 'a mother cannot make a gift of her son, for want of independence in her, unless she be authorised by an independent male. But the learned author had not chosen to assign a similar reason in the case of her receiving a son. Further, the same author in his latest work 'Dattaka Chandrika'(?) permitted

the woman to give away her son, if her husband be dead or have emigrated or entered a religious order, but did not find it necessary to require the authority of a male. It is apparent that he felt, on mature consideration, that the doctrine of woman's want of independence is unreal.

The 'Dattaka Mimamsa' of Vidyaranya Swamy, the author of Madhavyam, declared the doctrine that the widow may adopt with the assent of her husband's sapindas. But the view is based not on any presumption of want of independence in the widow but on the then obsolete practice of 'Niyoga', by which after the death of the husband leaving no children the sapindas used to raise issue to him by carnal intercourse with the widow. After referring to the practice of Niyoga the passage runs thus:

> "In the same way the adoption of a son by a widow with the permission of the father, etc., cannot be censurable in the Kali age".

This theory that the doctrine had its origin in the system of Niyoga will be found to be utterly untenable. To take a concrete illustration, the law prohibits intercourse by a father-in-law on his daughter-in-law according to the following sloka of Yagnavalkya:

> "Sexual intercourse with a friend's wife, a maiden, a uterine sister, a low caste female, females of the same gotras and daughters-in-law is ordained to be equal to violating the bed of one's guru".

Niyoga by a father-in-law cannot, therefore, be dreamt of and consequently he, the father-in-law, should have been rendered ineligible to give his consent to an adoption by his daughter-in-law. On the other hand, it is clear from judicial decisions that the consent of the father-in-law is not only preferable but absolutely indispensable, if he is alive, in order to validate an adoption by the daughter-in-law, in the absence of her husband's permission.

Thus, on the one hand, Devanda Bhatta supported the doctrine of consent by an assumption that woman is wanting in independence, which assumption, however, he later himself doubted, while on the other hand Vidyaranya Swamy sought to justify the same on the theory of Niyoga which we have found to be untenable.

In this state of the law the question of the validity of an adoption made with the assent of the sapindas came before the Privy Council, for the first time, in the Ramnad case, *Collector*

of Madura v. *Muthu Ramalinga*[1]. Their Lordships after reviewing the various sources of the law on the subject, held:

> "That the positive authority of 'Dattaka Chandrika' and 'Smriti Chandrika' and the 'Dattaka Mimamsa' by the author of Parasara Madhavyam affords a foundation for the doctrine safer than any built upon speculations touching the natural development of the Hindu law, etc."

and decided that the adoption was valid. Their Lordships were satisfied, first, that there existed in Southern India this practice of adoption with the assent of sapindas and were content with finding some justification for the practice in the works of Devanda Bhatta and Vidyaranya Swamy. Secondly, their Lordships were under the impression that under the Hindu system of jurisprudence "clear proof of usage outweighs the written text of law" and deliberately abstained from examining closely the soundness of the theories of those writers and whether those writers conform to the letter or spirit of Vasishta's text. The two grounds may be briefly considered in the light of the recognised principles of Hindu jurisprudence.

Dealing, first, with their Lordships' view regarding the authority of the works of Devanda Bhatta and Vidyaranya Swamy, reference may be made to their Lordships' estimate of those writings in a case that later went up to the Board, *Balusu Gurulingaswami* v. *Ramalakshmamma*[2]. Their Lordships state:

> "Their Lordships cannot concur with Mr. Justice Knox in saying that their (*i.e.*, of the works of Nanda Pandita and Devanda Bhatta) authority is open to examination, explanation, criticism, adoption or rejection like any scientific treatises on European jurisprudence. . . . . *But so far as saying that caution is required in accepting their glosses where they deviate from or add to the Smritis* their Lordships are prepared to concur with the learned Judge."

It is unfortunate that this position had not been pressed in the Ramnad case, for, it is beyond doubt that their Lordships would have ignored the works of Devanda Bhatta and Vidyaranya Swamy in so far as they deviate from Vasishta's text by requiring sapindas' consent, especially when the Mitakshara itself is silent on the matter; their Lordships would have found that the "presumed incapacity of women for independence" is derived from texts of Manu, Yagnavalkya and Narada which are mere moral injunctions intended only to regulate the conduct of women as part of the social fabric and which do not

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1. (1868) 12 M.I.A. 397.
2. (1899) 9 M.L.J. 67: L.R. 26 I.A. 113: I.L.R. 22 Mad. 398 (P.C.).

purport to lay down a legal incapacity for independent action or proper discretion based on any innate intellectual inferiority of the woman. In this connection it is interesting to note that in the Ramnad case itself the Privy Council gave the mother-in-law of the widow a seat in the family council of advisers, which is a direct and complete refutation of the doctrine of woman's incapacity for independence.

Next, as to the binding character of *usage* in derogation of *Smriti law*, it is submitted, with great respect to their Lordships, that the preponderance of opinion among ancient Hindu law givers is that custom cannot outweigh the written text of law. Katyayana, cited with approval in the Mitakshara, defined custom thus:

> "The peculiar law of a country that prevails from time immemorial *without conflict with the Vedas and the Smritis*, is called local custom. The usage of a family transmitted successively from father to son *according to law*, is family custom. That should be followed."

Again, Vasishta declared that customs obtaining in particular countries or particular times are obligatory *if not inconsistent with Srutis.*

That there existed, however slightly or rarely, the practice of seeking the consent of sapindas cannot be disputed, especially in view of the judicial decisions and opinions of text-writers referred to in the Ramnad case and its existence therefore falls to be accounted for. Mr. Mayne in his celebrated work on Hindu law gives what appears to be a cogent explanation for its existence. He says:

> "I have already stated that among the Tamil inhabitants of Northern Ceylon even the husband, when desirous to adopt, must obtain the consent of his heirs, and they must evidence their assent by dipping their fingers in saffron water. If such consent is withheld, the rights of the dissenting parties to the inheritance will not be affected.—Thesawaleme II, 1, 5, 6. Probably this was the original law in Southern India, though it may have passed away when the Brahmanical view of adoption as a duty and not merely a right, was introduced. *But the necessity for obtaining the consent of sapindas to an adoption by a widow, and the sufficiency of such consent may be a survival from the old law.*"

It is therefore quite probable that far from being a historical development from the text of Vasishta owing to the influence of the doctrine of Niyoga on it, the practice of obtaining the sapindas' consent represents the passing phase of a pre-existing non-Hindu institution fast getting out of vogue under the stress of Hindu law. But, while the practice of obtaining that consent should gradually have been wiped out of

existence if left to itself under the reaction of the Smriti law of adoption the process is arrested and the practice firmly established under a mistaken belief that it was a natural and logical consequence of that very Smriti law, and, it was then sought to be justified by one fanciful analogy and one false presumption. The result is curiously paradoxical.

We will now proceed to see how this forced and unwarranted extension of Vasishta's text landed the administration of justice in utterly illogical and embarrassing situations. It will also incidentally give us an insight into the truth of the doctrine we are discussing.

Their Lordships of the Privy Council stated in the Ramnad case:

"The question who are the kinsmen whose assent will supply the want of positive authority from the deceased husband is the first difficulty to suggest itself. Where the husband's family is in the normal condition of a Hindu family—*i.e.*, undivided—that question is of comparatively easy solution Though the father of the husband, if alive, might, as the head of the family and the natural guardian of the widow, be competent by his sole authority to authorise an adoption by her, yet, if there be no father, the consent of all the brothers, who, in default of adoption, would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will . . . . Where, as in this case, the widow has taken by inheritance the separate estate of her husband, their Lordships do not think there is any ground for saying that the consent of every kinsman, however remote, is essential. The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by adoption".

The above passage is rather indefinite as to the reasons that impelled their Lordships to recognise the theory of consent —whether it is the incompetence of the woman for independent discretion, or the proprietary interest of the sapindas which is likely to be prejudiced by the act of the widow, or, both together. Justice Holloway laid down in *Shri B. K. Pato Devu* v. *Shri R. A. Bhima Devu*[1] that the adoption by the widow with the assent of a sapinda is a substitute for the actual begetting by a sapinda and that therefore the argument from analogy is in favour of the assent of one sapinda rather than more. Whether the theory of Niyoga on which this conclusion is based is correct or not the same result follows equally from the theory of guardianship recognised by

1. (1873) 7 M.H.C.R. 301 at 305.

their Lordships; for, while the whole family is governed by one manager it is but fair to conclude that the eldest member, the manager of the joint family is alone sufficient to protect the widow as her guardian. The Privy Council endorsed this conclusion when they declared the competency of the father-in-law to authorise the widow by his sole assent, whether the family be joint or divided, and even though his assent is likely to prejudice the proprietary interest of the other sapindas. The observation made in a Travancore case reported in *Ramaswami Iyen* v. *Bhagati Ammal*[1] are to the same effect; the learned Chief Judge said:

> "In the case of divided kinsmen the case (of guardianship) may be different, because no one in particular can claim to control her, or is chargeable for her maintenance; but, it seems to be clear that, united as the family is, the natural head and venerable protector contemplated by the shastras is the surviving brother, or if there are more than one, the eldest of them. It seems to me impossible to affirm that the liability to maintain the widow, and undertake the other duties of the family, is not coupled with a right to advise and control her act in so important a matter as the introduction of a stranger into the family, with claims to the family property".

But instead of selecting the manager as the widow's guardian on the same principle that governed the case of a father-in-law, the Privy Council preferred to recognise the proprietary interests of the other coparceners and therefore vested the right to assent in all those sapindas; when this question of the preferential claims of the manager pointedly arose in *Ganesa Ratnam Aiyar* v. *Gopala Ratnam Aiyar*[2], their Lordships declined to express an opinion as they decided the case on other grounds. The doctrine of guardianship gave way before the demands of proprietary considerations.

Whatever may be said about the protection afforded to the widow by the father-in-law or the brothers-in-law in a joint family it is difficult to imagine that, in a state of division they can still exercise an influence or give protection to the widow whose husband himself severed his connection with his brothers, more often than not, after a disruption of their harmonious relations. If anything, it is their interest in the reversion that must be safeguarded and their consent must therefore have been held requisite on that ground. But the Privy Council revert back to the theory of guardianship, for, they refer to the pre-

1. (1873) 8 Madras Jurist 58.
2. (1880) L.R. 7 I.A. 173: I.L.R. 2 Mad. 270 (P.C.).

sumed incapacity of woman for independence in the passage cited above. Again, in *Veera Basavaraju* v. *Balasurya Prasada Rao*[1], their Lordships state:

"Division does not affect her personal dependence or give her an independent status to alter by her own authority the succession to the estate, which she takes as the widow of her husband. She is still dependent for counsel and protection, upon the nearest sapindas of her husband, who are the most closely united to him, by ties of blood, or to use the language of Hindu lawyers, 'by community of corporal particles'. The father of the deceased, if still alive, continues to be her natural guardian and venerable protector. He has, furthermore, a direct interest in the protection of the estate, for, in case of her death without leaving her surviving a daughter or the mother of the deceased husband, he has a right to the reversion. His authorisation is therefore essentially requisite to the validity of an adoption by her to her husband".

The fiction of guardianship is thus only a cloak to justify the necessity of obtaining the sapinda's consent but the real reason is their interest in the estate of the deceased. The right of guardianship and the right of property did not co-exist in the same person and the Privy Council found it hard to reconcile them. The latter criterion is followed to prevent the circle of sapindas from becoming too narrow in the case of the joint family and resort was had to the former to prevent it from becoming too wide when the family is separate.

As the theory of guardianship, considered to be the basic principle of the doctrine of consent, was found wanting in solving the practical problems arising out of the doctrine, their Lordships had resort to the purely temporal consideration of the sapindas' interest in the reversion. The risk of being divested of their proprietary interest by the action of the adopting widow was felt as an equitable reason to confer on the sapindas a power of controlling, by their consent, the freedom of her action. But, if we pause for a while to consider the merits of this newly adopted criterion, we find that it is totally unsupported by the principles of Hindu law. An adoption by the widow, whether sanctioned by her husband's authorisation, or by the sapindas' consent, would equally divest the sapindas of their right to the estate. Their Lordships of the Privy Council, discussing about the limits of the power of a widow to make an adoption with her husband's authority in *Amarendra* v. *Sanatan*[2], remarked:

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1. (1918) 36 M.L.J. 40: L.R. 45 I.A. 265: I.L.R. 41 Mad. 998 (P.C.).
2. (1933) 65 M.L.J. 203: L.R. 60 I.A. 242: I.L.R. 12 Pat. 642 (P.C.).

"Nor do the authoritative texts appear to limit the exercise of the power by any considerations of property. But that there must be some limit to its exercise, or at all events some conditions in which it would be either contrary to the spirit of the Hindu doctrine to admit its continuance, or inequitable in the face of other rights to allow it to take effect, has long been recognised both by the Courts in India and by this Board, and it is upon the difficult question of where the line should be drawn, and upon what principle, that the argument in the present case has mainly turned",

and they decided that

"the vesting of the property on the death of the last holder in someone other than the adopting widow, be it either another coparcener of the joint family, or an outsider claiming by reverter, or, their Lordships would add, by inheritance, cannot be in itself the test of the continuance or extinction of the power of adoption".

If Vasishta's text were deemed to have permitted an authorisation by the sapindas also, the same considerations should hold good equally in that case and proprietary considerations should therefore have been held irrelevant in the case of an adoption with the assent of the sapindas. Indeed, Holloway, J., held in *Shri B. K. Pato Devu* v. *Shri R. A. Bhima Devu*[1], that

"proximity to the deceased with respect to rights of property is wholly beside the question, and, if this were not so, the rule would be entirely defeated".

But the Privy Council dissenting from this conclusion of Holloway, J., remark in *Raghunatha Deo* v. *Brozo Kishoro*[2]:

"It may be the duty of a Court of Justice administering the Hindu law to consider the religious duty of adopting a son as the essential foundation of the law of adoption, and the effect of an adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of property and, it may be, in the case of collateral succession, the rights of parties in actual possession, subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion, over property. It seems, therefore, to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it".

These social objections are the concomitants of an unwarranted extension of the widow's power to adopt, but, if it had been realised that the doctrine of consent which enlarges her power is neither implicit in, nor even logically derived from, the text of Vasishta, there would have been no need to enter into anomalous positions in order to safeguard the rights of others.

It is well known that adoption is devised to serve two purposes—one religious to secure spiritual benefit to the

1. (1873) 7 M.H.C.R. 301 at 305.
2. (1876) L.R. 3 I.A. 154: I.L.R. 1 Mad. 69 (P.C.).

adopter and his ancestors by offering funeral cakes and libations of water, and the other secular, to secure an heir for perpetuating the adopter's lineage. Can the adoption ever fail in the said purposes whatever be the motives which induced the widow to make an adoption and can the adoption be deemed inexpedient on that score? Where the widow adopts with the express permission or the presumed authority of her husband, there is no authority for the proposition that a Court can never question her motives as she does an act that she has an absolute right to do (vide *Vasudeo* v. *Ramchandra*[1]). There should be no difference in principle even in the case where the widow has to adopt with the assent of the sapindas. As Mr. Mayne says:

> "When a religious act comes to be indissolubly connected with civil consequences, it follows that the act may be properly performed, either with a view to the religious or the civil results. Not only so, but that if the act is in fact performed, the civil consequences must follow whatever be the motives of the actor".

Again:

> "The judgment of the Court cannot be affected by the motives of the suitor. The reasons which influence the widow may be puerile or even malicious. But, what the family decide upon is the propriety of her act, not the propriety of her reasons".

And, Kumaraswamy Sastry, J., observed in *Krishnayya Rao* v. *Maharajah of Pittapur*[2]:

> "Secular motives do come into play and influence persons in making adoption. Where an adoption is made by a widow both in fulfilment of her religious duties and also for the purpose of getting a gain for herself, it seems to me, the proper thing is to hold that the adoption would be valid while any arrangement for her personal benefit, if not within the limits actually allowed by law, would be void. . . . . Where it is necessary, I would incline to the view that the Court cannot set aside an adoption by going into consideration of the motives of the widow making the adoption".

But, what necessitated a discussion upon such an apparently simple subject is the following passage of the Judicial Committee in the Ramnad case:

> "Their Lordships do not think there is any ground for saying that the consent of every kinsman, however remote, is essential. . . . . . . All that can be said is that there should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty and *neither capriciously nor from a corrupt motive*".

1. (1896) I.L.R. 22 Bom. 551 at 558 (F.B.).
2. (1928) 55 M.L.J. 894 at 970: I.L.R. 51 Mad. 893 (F.B.).

Explaining this passage later in *Rajah Vellanki Venkata* v. *Venkata Rama*[1], their Lordships observed that the evidence required was not of the widow's motives but of the assent of the kinsmen and added:

"Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow, and that all which this committee in the former case intended to lay down was, that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interests of this or that sapinda, but upon a fair consideration, by what may be called a Family Council, of the expediency of substituting an heir by adoption to the deceased husband".

Even from this, it is not quite clear whether their Lordships are of opinion that a widow's motives in making an adoption are material.

The Privy Council has not so far concluded the question by expressing a definite opinion on the relevancy of the widow's motive, for, in a case arising from Bombay, so recently as in *Vijaysingji* v. *Shivsangji*[2]. Their Lordships state:

"It is however contended that the adoption was made by Kesarba, not for the spiritual benefit of her husband, but in order to deprive the plaintiff of his inheritance. But there is no evidence to prove any improper motive, and if the adoption causes harm to the plaintiff, it nevertheless confers spiritual benefit upon the husband. Moreover the rule is firmly established that in the Bombay Presidency a widow who has no authority from her deceased husband, may adopt a son to him, *and that it is not necessary for her to obtain the consent of his kinsmen*".

Their Lordships seem to be of the opinion that the question of motive would be pertinent in a case where the consent of the kinsmen is required. But in the recent case of *Krishnayya Rao* v. *Venkata Kumara Mahipati Surya Rao*[3]:

"Their Lordships doubt, if when the consent of the sapindas *has been* obtained, the motive of the adopting widow is relevant. They do not however consider it necessary to decide the question in the present case. . . . ."

It is equally clear on the other hand, that the widow's motive in adopting a boy is equally irrelevant and unavailing if the consent of the sapindas *has not been obtained*. Motive therefore seems in theory, not to have any bearing on the validity of an adoption.

But one, at least, of the reasons for selecting the test of motive is obvious from the passage quoted above from the

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1. (1876) L.R. 4 I.A. 1 at 14: I.L.R. 1 Mad. 174 (P.C.).
2. (1935) 68 M.L.J. 701: L.R. 62 I.A. 161 : I.L.R. 59 Bom. 360 (P. C.).
3. (1935) 69 M.L.J. 388: A.I.R. 1935 P. C. 190 (P.C.).

Ramnad case, *viz.*, their anxiety to meet the practical difficulty, which arises as a result of the doctrine of consent, of obtaining the assent of all the kinsmen whose extent it may possibly be difficult to ascertain. For, they state:

> "Their Lordships do not think there is any ground for saying that the consent of every kinsman, however remote, is essential"

and prescribe a test as to the sufficiency of assent, that the assent must be such:

> "As suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty and neither capriciously nor from a corrupt motive".

According to their Lordships, the presumption of want of discretion can be sufficiently answered by a presumptive proof of the widow's *bona fide* motives in making an adoption; and the assent of those, who stand nearest in degree to the deceased and have an immediate stake in the reversionary interest, may naturally be taken as proof presumptive of the *bona fides* of the widow's action. The circle of sapindas will thus be limited to the nearest in the order of succession. The doctrine of motive however much foreign to the theory of adoption served the double purpose of limiting the circle of sapindas to be consulted and of securing their reversionary interest. Being forced, as their Lordships felt, to recognise the necessity of sapinda's consent, the Judicial Committee invented the test of motive in mitigation of its consequences but very soon recognised in the Guntur case, its incompatibility with the principles of adoption. Where no consent of sapindas is required as in Bengal or Bombay, the adoption being made by the widow with the husband's authority, actual or presumed, no question of injustice or hardship to the kinsmen and consequently no question of the widow's motive arises, and the incongruous doctrine of motive is necessitated only by the needless theory of sapinda's consent.

The theory of consent being based on the presumption that the woman because of her intellectual weakness requires disinterested advice from her protectors, it should follow that the adopting widow should be made to obtain the consent of all the sapindas, or at any rate, of the nearest sapindas, irrespective of whether they are sagotra sapindas or bhinnagotra sapindas. Some relations who are cognates are more directly interested in the well-being of the widow and the spiritual welfare of the

deceased than many remote agnate relations, and, it stands therefore to reason that such cognates ought to have the privilege of advising the widow as to the expediency of adoption in preference to the more remote agnates.

Yet, contrary to expectation, when the question arose in *Viswasundara Rao* v. *Somasundara Rao*[1] whether a daughter's son is entitled to be consulted regarding an adoption by the widow it was held that as he was not a gnati he has no claim as of right to be consulted; and that authority was followed in *Murahari* v. *Sumitramma*[2] by Madhavan Nair and Jackson, JJ., who held that a daughter was incompetent to give her consent. It was also approved of by Sundaram Chetty, J., in *Solaimalai* v. *Sokkammal*[3].

But in *Kesar Singh* v. *Secretary of State for India*[4] his Lordship Justice Venkatasubba Rao, after an exhaustive survey of the several Privy Council decisions bearing on the point in question, stated:

"Are we to ignore the repeated use of the words 'sapindas' and 'kinsmen' on the ground that the word 'agnate' is in some places used? The reasons given and the considerations adverted to apply equally to cognates, *i.e.*, bhinnagotra sapindas, as to agnates or sagotra sapindas. In the later cases most distinct emphasis is laid upon the reversionary interest of the consenting kinsmen".

And again:

"There is nothing in those decisions which, expressly or impliedly, gives countenance to the theory that in regard to consent, cognates stand on a footing different from that of agnates. In the scheme of the Mitakshara Succession, cognates are with the exception of the daughter's son, as a body postponed to agnates. As the consent of the nearer agnates is requisite and sufficient, so the consent, on failure of agnates, of the nearer cognates, would similarly validate an adoption. The rules laid down in the case of agnates, such as the view of the majority prevailing, must *mutatis mutandis* apply also to cognates. Judged from the standpoint of the particular relation being required to fill the position of the widow's natural guardian or to possess an interest in the spiritual welfare of her husband, several cognate relations, as several agnate kinsmen, may be found to lack the necessary qualifications; but the test of propinquity from the point of view of property will be found an unfailing test and a sure guide".

This passage was interpreted in *Murahari* v. *Sumitramma*[2] and *Solaimalai* v. *Sokkammal*[3], to mean that cognate reversioners need be, or rather could be, consulted

1. (1920) I.L.R. 43 Mad. 876.
2. (1933) 66 M.L.J. 577: I.L.R. 57 M. 411: A.I.R. 1934 Mad. 191.
3. (1934) 67 M.L.J. 618: A.I.R. 1934 Mad. 567.
4. (1926) 51 M.L.J. 16: I.L.R. 49 Mad. 652.

by a widow only in the absence of agnate kinsmen and that their assent would be of no avail if any agnates be in existence. Though his Lordship's judgment was delivered in a case where the agnates were non-existent and so ought to be confined to the facts of the case, that cannot in any way take away the value to be given to his general observations which were made after a close analysis of the whole case-law on the matter; and his Lordship, far from recognising any such preference of agnates over cognates, expressly declared about their absolute equality, the selection of sapindas who are entitled to give assent depending on the sole question of their right to the reversion.

This preference to propinquity from the point of view of property, however much justifiable on social and equitable grounds, leads to a result which is strange and illogical from the point of view of the theory of consent, because, contrary to common experience, more distantly related agnates would have to be deemed as better advisers. Though since the amendment of the law of succession by the Hindu Law of Inheritance Amendment Act (II of 1929) rights of property are granted to certain cognates in priority to several agnates in recognition of their close affinity to the deceased, and therefore the consent of such cognates will hereafter have to be preferred, the result is not the outcome of the principle of sapinda's consent and it is clear that the Madras High Court was prepared to give the go-by to the doctrine of consent based on the theory of guardianship if it comes in conflict with other vested interests.

The Privy Council had declared in the Guntur case that the assent to be given must be in the nature of a decision of a family council on the propriety or expediency of adoption. Having regard to the difficulty that would arise, if the consent of all the kinsmen, however remote, were deemed to be necessary it has been held in *Subrahmanyam* v. *Venkamma*[1] that the principle of the decisions of the Privy Council would be satisfied if the consent of the nearest sapindas, even if there is only one such, be obtained. For, their Lordships, Benson and Bhashyam Aiyangar, JJ., say that:

"The expression 'family council' is no doubt rather too general and comprehensive. It is not probable that it was intended to include the whole circle of sapindas and samanodakas, or, to imply that they should assemble. The presumptive reversionary heir or heirs are the nearest of kin to the

1. (1903) 13 M.L.J. 239: I.L.R. 26 Mad. 627 at 635.

deceased husband and as such the natural advisers of the widow, and if his or their assent be obtained and the same be given *bona fide* and not from any corrupt motive, that would be sufficient authority on which she could act and it would not be necessary that she should seek the assent of remoter reversionary heirs".

The Privy Council has given another reason in *Veera Basavaraju* v. *Balasurya Prasada Rao*[1] for preferring the nearest reversioners, namely, that the remoter sapindas are liable to be very reckless in giving their consent, as their interest in the well-being of the widow, or the spiritual welfare of the deceased or in the protection of the estate, is of minute character, and their assent is more likely to be influenced by improper motives. As Venkatasubba Rao, J., remarks in *Kesar Singh* v. *Secretary of State for India*[2], commenting on the Privy Council decision in *Veera Basavaraju* v. *Balasurya Prasada Rao*[1]:

"The reason for insisting upon the consent of the nearest sapindas is stated to be that they are interested in the well-being of the widow (in other words) that they are her natural guardians and that they are interested in the spiritual welfare of the deceased and in the protection of his estate. It may be remarked that if the nearest sapinda happens to be sufficiently remote the first two elements exist only in theory. The consideration that uniformly holds good is the third consideration, namely, that pertaining to the devolution of the property. In this connection it is useful to note, as indicating the development of the doctrine, the emphasis their Lordships lay upon the temporal aspect of the adoption".

But, it is not practicable to rely too much on the assent of the nearest sapinda which is often liable to be withheld from improper and selfish motives since it would not be expected that he would thus relinquish his right to the succession; and the right of adoption by a widow which is founded on the duty of insuring the most efficacious performance of her husband's funeral rites would thus become illusory. It was therefore provided as a safeguard that in case of improper refusal on the part of the nearest sapinda the more remote kinsmen may be approached (vide *Venkatarama Raju* v. *Bapamma Raju*[3]).

This preference of the nearest sapindas presents another hardship in the case of a family which is partly divided and partly undivided. To take a concrete case, where the deceased left behind him a son of his undivided brother and a brother who was divided, the adopting widow has, on this principle of

1. (1918) 36 M.L.J. 40: L.R. 45 I.A. 265: I.L.R. 41 Mad. 998 (P.C.).
2. (1926) 51 M.L.J. 16: I.L.R. 49 Mad. 652.
3. (1914) M.W.N. 911.

preference, perforce to seek and obtain the consent of the divided brother to the exclusion of the undivided brother's son; but the adoption therewith made would contravene the dictum in the Ramnad case that:

"it would be unjust to allow the widow to defeat their (the undivided coparceners') interest by introducing a new coparcener against their will".

The Judicial Committee declared in *Raghunatha Deo* v. *Brozo Kishoro*[1] that the requisite authority is, in the case of an undivided family, to be sought within that family. Their Lordships state at p. 81:

"An undivided Hindu family is ordinarily joint not only in estate, but in food and worship; therefore not only the concerns of the joint property but whatever relates to their commensality and their religious duties and observances, must be regulated by its members, or by the manager to whom they have expressly or by implication delegated the task of regulation. The Hindu wife upon her marriage passes into and becomes a member of that family. It is upon that family that, as a widow, she has her claim for maintenance. It is in that family that, in the strict contemplation of law, she ought to reside. It is in the members of that family that she must presumably find such counsellors and protectors as the law makes requisite for her. There seem to be strong reasons against the conclusion that, for such a purpose as that now under consideration (*viz.*, making an adoption to the deceased), she can, at her will, travel out of that undivided family, and obtain the authorisation required from a separated and remote kinsmen of her husband".

These considerations based as they are both on law and equity apply with equal force even if the divided kinsman be not remote, but, of the same degree as, or even nearer than, the undivided coparcener. It is therefore manifestly clear that there is such a conflict with other important branches of the Hindu law as to cast a serious doubt regarding the soundness of the principle of sapinda's consent.

Yet another difficulty suggests itself from the doctrine of consent. If, really, Vasishta's text covers the case of an adoption with the assent of sapindas, their assent, as in the case of the husband's authority, should become operative even after their death. In the words of his Lordship Seshagiri Aiyar, J., in *Suryanarayana* v. *Ramadoss*[2]:

"As a widow in a Mitakshara family is incompetent to act *sui juris*, she can make an adoption only if she is authorised to do so by her husband. To this an exception has been engrafted to the effect that the absence of this authority can be made good by the assent of the sapindas . . . . . Their consent is equivalent to an expression of opinion that the adoption is necessary for the spiritual benefit of the deceased and for

1. (1876) L.R. 3 I.A. 154: I.L.R. 1 Mad. 69 (P.C.).
2. (1917) 34 M.L.J. 87: I.L.R. 41 Mad. 604.

securing the secular management of his properties. In *Raghunatha Deo* v. *Brozo Kishoro*[1] the Judicial Committee speak of these sapindas as 'councillors and protectors' of the widow. An analogy for this may be found in the consent of the nearest reversioner being regarded as evidence that the alienation was for justifiable purposes. In the one case the assent is evidence that the widow is not acting capriciously to serve her own ends, and in the other, that she is not illegally disposing of property solely to benefit herself. In both the cases, the assent is presumptive evidence of the goodness of the act. It is open in either case to rebut the presumption by showing that the assent is not given *bona fide*. This train of thought precludes me from acceding to the proposition that mere lapse of time without more, or the death of the consenting sapinda, would put an end to the authorisation freely and *bona fide* granted. It is settled that the fact that a consent to an alienation was given by a reversioner who is dead would not by itself be sufficient to enable the reversioner entitled to succeed to the property to impeach that consent. In my opinion the same reasoning should govern the assent to an adoption."

But the Madras High Court refused to extend the rule of assent to its logical limits. Their Lordships Benson and Abdur Rahim, JJ., say in *Mani* v. *Subbarayar*[2] as follows:—

"No case has been brought to our notice in which the authority given by a deceased sapinda who, while living, was the one most competent to decide upon the propriety or otherwise of the adoption being made was held to be sufficient to authorise an adoption made after his death in disregard of the opinion of the nearest sapindas who were living at the date of adoption and had not joined the deceased sapinda in giving the authority. The question is, should we be justified in extending the rule regarding adoption with the assent of sapindas to a case like this. It is not quite easy to ascertain the exact principle on which the necessity or sufficiency of the assent of sapinda is based."

They add further,

"No doubt, it may not be necessary that the consent should be given actually at the time the adoption is made, but it seems to us that at any rate, a consent previously obtained from a deceased sapinda cannot be efficacious to validate an adoption which is not *approved* by the persons who are the nearest sapindas at the time the adoption is actually made."

The Bombay High Court also expressed to the same effect in *Lakshmibai* v. *Vishnu Vasudev*[3]:

"In the Ramnad case, it is the father-in-law, if alive, that is described as competent to give an effective assent to an adoption, while, to treat his consent as operative after his death would be to extend to fresh conditions a widow's power of divesting, contrary to the general tendency of the Courts from the Privy Council downwards, in favour of limiting the exercise of the power of adoption by women after the death of their husbands."

But subsequently, their Lordships of the Madras High Court began to attempt a compromise between the conflicting

1. (1876) L.R. 3 I.A. 154: I.L.R. 1 Mad. 69 (P.C.).
2. (1911) 24 M.L.J. 484: I.L.R. 36 Mad. 145.
3. (1905) I.L.R. 29 Bom. 4?0.

views expressed in *Mani* v. *Subbarayar*[1] and *Suryanarayana* v. *Ramadoss*[2], by resorting to ingenious arguments. For example, in *Ammanna* v. *Satyanarayana*[3], where the father-in-law that gave the consent died and 3 out of 5 sapindas alive on the date of adoption were present at the ceremony, his Lordship, Viswanadha Sastry, J., while purporting to rely on the dictum in *Mani* v. *Subbarayar*[1], held:

> "that presence at an adoption ceremony would imply acquiescence, though such acquiescence may not be equivalent to consent, is the view taken in *Ramchandra Bhagavan* v. *Mulji Nanabhai*[4]. In the present case all that Iwas needed was acquiescence in a consent already given, and not fresh consent".

It will therefore be seen that the positive *approval* at the time of adoption as required in the 36 Madras case is substituted in the 51 M.L.J. case by an acquiescence, and it was provided that such acquiescence may be implied from the mere presence of, and perhaps even from the absence of protest from, the sapindas alive at the time of adoption, as the nearest approach to the conclusion drawn in the 41 Madras case. His Lordship further added following the judgment of Ramesam, J., in *Anne Brahmayya* v. *Chelasami Rattayya*[5]:

> "In my opinion the trend of these decisions is that when the consent is given by the father-in-law who happens to be the nearest sapinda then living, his death before the adoption is made would not *ipso facto* revoke the consent; and that such consent will come to an end only if circumstances had materially changed after his death,"

namely, either by the coming into existence of the other near sapindas, or by the death of sapindas then alive, or by reason of the estate having vested in third persons.

The final stage in the compromise is reached in the Full Bench case of *Annapurnamma* v. *Appayya Sastri*[6]. Their Lordships Coutts-Trotter, C.J. and Madhavan Nair and Jackson, JJ., after discussing the object of adoption and the origin of the theory of consent, held

> "The adoption would not be vitiated merely because the son had no proprietary interest to lose by the adoption when actually made or it tended to defeat the reversionary rights of other sapindas. If, however, the evidence bearing on consent leads to the conclusion that the motive which actuated the widow in making the adoption was to defeat the reversionary interest of the sapindas then the adoption would necessarily be invalid. These being the

1. (1911) 24 M.L.J. 484: I.L.R. 36 Mad. 145.
2. (1917) 34 M.L.J. 87: I.L.R. 41 Mad. 604.
3. (1925) 51 M.L.J. 426: I.L.R. 49 Mad. 636.
4. (1896) I.L.R. 22 Bom. 558 (F.B.).
5. (1924) 20 L.W. 503.
6. (1928) 56 M.L.J. 760: I.L.R. 52 Mad. 620 (F.B.).

true considerations, it would follow that the death of the son will not affect the validity of his consent or of the adoption based on it."

Continuing, they observed:

"If as we have already pointed out, the determining factor is the object of the widow in making the adoption and the considerations based on the loss of proprietary rights of the reversioners merely serve as aids in appreciating the true nature of the consent and the circumstances relating to the adoption, it is difficult to perceive the necessity for the subsequent consent or approval of the reversioner living at the time when the adoption is actually made. *The reservation that the consent should be acted upon with reasonable promptitude, and that circumstances should not have undergone a material alteration would seem to meet the ends in view irrespective of the question whether the assenting sapinda was dead at the time of the adoption or whether those living then approved of it.*"

Thus, while preserving the reasoning and logical conclusion of Seshagiri Iyer, J., from the theory of sapindas' consent the Madras High Court limited the operation of the theory within very narrow bounds with a view to avoid the evil consequences and the unhappy results flowing from such a logical extension of the theory. This circuitous mode of attacking the evil could easily have been avoided if Vasishta's text had been correctly understood untrammelled by the interpretation of doubtful authorities.

The unsoundness of the doctrine of consent will be patent if we turn to consider the case of adoption by a junior widow with the consent of the sapindas but without the consent of the senior widow. The logical application of the doctrine to such a case lands us in a situation contrary to existing practice and directly opposed to other well-recognised doctrines of Hindu Law. It is well known that when a man has more wives than one, he can associate any one of them with him in adoption and can give an authority to any one of them to adopt after his death; his choice is in no way restricted, and he can prefer the junior widow to the senior, the younger to the elder. Now, as the junior widow can adopt with the authority of her deceased husband, she should be deemed to be in exactly the same position even if she obtains the consent of the sapindas, the sole object and import of the consent of the sapindas being that it should be the equivalent of the authority of the husband; and her adoption should be held valid even if it be against the will of the senior widow.

But we find that Sankaran Nair and Spencer, JJ., held in *Kakerla Chukkamma* v. *Kakerla Punnamma*[1] that an adoption

1. (1915) M.W.N. 19.

by a junior widow under the above circumstances is invalid. The main reason assigned is that when several widows inherit jointly, the senior widow in the case of an ordinary coparcenership has a preferential right to the management of the joint property on behalf of all the widows, that in the case of impartible property she is entitled to hold it subject to the rights of the others for maintenance and that the adoption by the junior widow will thus have the effect of depriving her of the impartible property or the possession of the coparcenary property. The case was followed with approval in *Venkatappa* v. *Ranga Row*[1], by their Lordships Wallis, C.J. and Coutts-Trotter, J. Wallis, C.J., based his judgment on the text of Yagnavalkya which says:

सत्यामन्यां सवर्णायां धर्मकार्यं न कारयेत् ।
सवर्णासु विधौ धर्मे ज्येष्ठया न विनेतरां ॥

—*Acharakanda*, 89.

"When there is a wife of an equal class present never do acts of religion with any other. When there is more than one wife of the same class as yourself in matters of religion never employ any but the eldest."

After discussing the meaning of 'patni' (पत्नि) as one who partakes in the holy sacrifices, the learned Judge says,

"Admitting, however, that the junior wives are patnis in the sense of being capable of partaking in sacrificial acts, it still remains true on the express authority of the Mitakshara, that the senior wife has the preferential right, as regards religious acts and this appears to me to be a sufficient foundation for her preferential right as to adoption."

His Lordship proceeding says:

"In view of the inconveniences attendant on simultaneous rights of adoption and in the significant absence of any evidence that such an equal right has ever been claimed in our courts for junior widows prior to these two cases, I think the onus is on those who assert it to show that the law in Madras differs in this respect from that which prevails in the adjoining presidency (*i.e.*, Bombay)."

The judgment of his Lordship Coutts-Trotter, J. (as he then was) is interesting: he says,

An English Judge in deciding a case of English Common Law is in theory declaring what custom on the subject has subsisted immemorially in the country. An Indian Judge in deciding a question of Hindu law is in theory expounding the true construction of mandatory utterances to which a divine origin is ascribed, aided or impeded in his task by ancient commentaries, text books of authority and judicial decisions of the Indian Courts and of the Privy Council. Now, there is little but fiction in either theory, and a Judge in both countries has only to apply the principles of previous decisions to particular sets of facts. But I think that the theoretical objection has just this

1. 1915 M.W.N. 424 (s.c. I.L.R. 39 Mad. 772).

much effect, that the argument that a suggested result is not in accordance with known practice will have less weight in India, if it can be shown to be the logical deduction from the authorities. In the present case I feel it very difficult to escape from the conclusion that *Vellanki Venkata Krishna* v. *Venkata Rama* [1]*Lakshmi*, has declared the consent of the sapindas to be in all respects the equivalent of express authority from the husband. On the other hand it is quite clear from the books, that to give effect to the appellant's contention would be quite contrary to what every one has hitherto supposed to be the law, and to legalise what in practice is a complete innovation. It is also a practice likely to lead to extreme inconvenience, to use no stronger term.........I think it would be quite wrong for me to give expression to any opinion that might tend to unsettle the former decision of this Court or give any encouragement to its challenge in other cases."

It is manifest that his Lordship evidenced such reluctance and hesitation before giving recognition to the practice of conferring preferential rights to the senior widow as he felt he was thereby violating the mandatory and divine utterances of the ancient sages, of which, he believed without a doubt that the doctrine of consent was one. But if this eminent judge had investigated into the soundness of the doctrine of consent he would have found that it is this doctrine and not the preferential right of the senior widow that was an innovation in the Hindu Law, that the precept of Yagnavalkya regarding the senior widow's rights was in perfect harmony with that of Vasishta on the subject of adoption by women, and, that the conflict arose because a strange factor of sapinda's consent based on a principle alien to the institution of adoption was given recognition to by the courts.

A consideration of the case of plurality of widows suggests yet another curious inconsistency from the point of view of the theory of sapinda's consent. It is undisputed that the wife becomes a sapinda of her husband by marriage and is therefore given a right of inheritance to him among the class of sapindas. Barring the case of a son, grandson or great-grand son whose presence would be a bar to adoption even by the husband the widow is the nearest of the husband's sapindas. If the doctrine of sapindas' consent and its off-shoot that the nearest sapinda excludes the more remote were to be applied strictly to the case of an adoption by the senior widow it follows that in the absence of her husband's permission, even the senior widow must be obliged to seek for, and secure, the consent of the junior widow, she being the nearest of the husband's sapindas and the heir presumptive to be reckoned with

1. (1876) L.R. 4 I.A. 1: I.L.R. 1 Mad. 174 (P.C.).

at the time of adoption. The other sapindas should be relegated to the background and rendered incapable of offering their assent so long at least as the junior widow acts *bona fide.* But curiously, we find that the Bombay High Court in *Rukmabai* v. *Radhabai*[1], the Calcutta High Court in *Ranjit Lal* v. *Bijoy Krishna*[2], and the Madras High Court in *Narayanaswami Naick* v. *Mangammal*[3] have uniformly laid down that the senior widow may adopt without the consent of the junior widow, provided that in Madras she obtained the consent of the kinsmen. The Bombay High Court has held that though:

> "It would seem to be unjust to allow the elder widow to defeat the interest of the younger by an adoption against her wish, yet, if the adoption is regarded as the performance of a religious duty and a meritorious act, to which the assent of the husband is to be implied wherever she has not forbidden it, it would seem that the younger widow is bound to give her consent being entitled to a due provision for her maintenance and if she refuses, the elder widow may adopt without it."

Jenkins, C.J., in the Calcutta case referred to above observed:

> "Now, it is well established in the Presidency of Bombay that, as between co-widows, it is the senior, that is to say, she, whose marriage was earlier, that has the preferential right to adopt in circumstances like the present. Those decisions rest upon fundamental principles and on views of Hindu life and economy which appears to me to be fully applicable here. Any other view would merely lead to an unseemly scramble for the purpose of performing this solemn act."

And, Justices Davies and Benson rest their decision in *Narayanaswami Naick* v. *Mangammal*[3], on the further ground that a junior widow need not even be consulted, for,

> "she is bound as a matter of duty to consent, and if, as their Lordships of the Privy Council say in *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*[4], the consent of the kinsmen is required by reason of the presumed incapacity of women for independence rather than the necessity of procuring the consent of all those whose interest in the estate would be defeated by the adoption, it would seem that the omission to consult the co-widow, though no doubt improper, would not be a sufficient reason for holding the adoption to be invalid".

It will be seen that their Lordships while relying on the dictum of the Privy Council to justify their decision overlooked the corollary of that very dictum that the nearer sapinda excludes the more remote.

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1. (1868(5 B.H.C.R.A.C.J. 181.
2. (1912) I.L.R. 39 Cal. 582.
3. (1905) 15 M.L.J. 143: I.L.R. 28 Mad. 315.
4. (1868) 12 M.I.A. 397.

Another anomalous position will arise if we consider the extent of the power of the sapindas to give their as sent. It is well-known that a husband can authorise his wife to adopt any boy she likes and at any time she chooses. If the word भर्तुः is deemed to have been used in Vasishta's text in its etymological sense of one who protects, *i.e.*, a guardian, it is logical to expect that the sapinda who is supposed to protect the widow should, equally with her husband, have been empowered to give a similar general authority to the widow to adopt. But the sapinda was denied such an unlimited power by the decisions of the Madras High Court. In *Suryanarayana* v. *Venkatarama*,[1] where the sapindas gave their authority stating that:

"You should adopt any boy at any time you please and perpetuate the family,"

their Lordships Subrahmanya Iyer and Davies, JJ., remarked that:

"That assent was not valid for several reasons, the most important of which is that it was too general in its nature—'any boy at any time'—and was not acted on for nine years, during which circumstances had materially changed."

This dictum was understood in *Veera Basavaraju* v. *Balasurya Prasada Rao*[2] to mean that such general power is useless and cannot be acted upon even immediately. In *Kamesam* v. *Butchamma*[3], the same dictum was explained differently thus:

We do not think that the learned judges intended to lay down that merely because the sapindas have so much confidence in the widow's good sense and good faith as to give her the widest discretion as to the time of adoption and the boy to be adopted, the authority cannot be availed of by the widow when she made the adoption almost immediately after she got the authority and when the sapindas who gave the authority were all alive and had not withdrawn their authority".

But Ramesam, J., in *Brahmayya* v. *Rattayya*,[4] dissented from that explanation and observed:

"There is an essential difference between the authority of the husband and the assent of a sapinda. The former is intended to be exercised only after the death of the husband. The latter is intended to be used at a reasonable time after the consent is given. When the interval is short, the death of the sapindas may not matter; but a sapinda's assent is not to be pocketed by the widow and used long after it was given, when entirely different considerations as to the expediency of the adoption may apply. Again, the boy to be adopted ought also to be referred to the consideration of the sapinda . . . . A boy chosen by the widow may be undesirable. He may have

1. (1903) 13 M.L.J. 318: I.L.R. 26 Mad. 681.
2. (1914) M.W.N. 502.
3. (1914) 1 L.W. 511.
4. (1924) M.W.N. 844.

physical and moral defects and so unfit to be the heir to a particular estate I therefore hold that the consent is too general and on that ground is invalid."

Whether one would agree or not with the reasons adduced by his Lordship, the obvious fact remains that the assent of the sapinda is not treated on a par with the husband's authority. The real reason seems to be a desire to confine the sapinda's power to narrow limits and thereby restrict the capacity of the widow to make an adoption.

The adoption of a boy having been intended to the husband and for his benefit, if the wife happens to make an adoption without previously obtaining her husband's consent the husband may by a subsequent ratification of her act make the adoptee, his own. As the wife is permitted to adopt, according to Vasishta's text, only by a delegation of power from her husband, the general law governing the principal and agent applies to such a case and her adoption can be validated by the principle of ratification. The doctrine requiring sapindas' consent being based on the initial disqualification of woman for independence her act of adoption cannot be ratified by a consent accorded subsequently by the sapindas, for, a void act can never become valid. Holloway, J., however considered that such an adoption can be validated. In *The Collector of Madura* v. *M. Ramalinga Sethupathi*[1] the learned Judge said:

"It is clear, however, that he (the sapinda) gave a subsequent assent, if such assent would avail. To assume that it would not, would be to treat an adoption as a solemnity, and this present assent as absolutely indispensable to its validity. We do not think that this is a reasonable view. The essence of the transaction is the giving and receiving. To render that giving and receiving a valid adoption some contend that the assent of certain persons is necessary. We are unable to see the least reason for contending that a principle which is to be found in the law of all countries does not properly apply to the Hindu law, particularly when we find in favoured transactions, such as this, the constant recurrence of the maxim that the absence of positive dissent should be taken as assent."

With great respect, we cannot concur with his Lordship's view that the consent of the sapindas was not more than a formality as he evidently overlooked the fact that the Madras school had not approved of the principle of presumed assent in construing the text of Vasishta. The premises not being correct his Lordship's conclusion is not sustainable under law. When the matter went up in appeal in the Ramnad case, this aspect of the question had not, unfortunately, been adverted

1. (1864) 2 M.H.C.R. 206.

to by the Judicial Committee. But when the question was pointedly raised later in *Duraiswami Pillai* v. *Chinnia Goundan*[1] Wallis, C.J. and Kumaraswamy Sastry, J., said:

"We are not prepared in the absence of authority to hold that such subsequent assent of the sapindas would validate the adoption. The doctrine of the consent of the sapindas validating an adoption which was laid down by the Privy Council in the Ramnad case was based largely upon the custom prevailing in this part of India rather than upon cited texts. A different custom prevails in Bombay and Bengal. We are not prepared in the absence of any evidence or authority to hold that the custom under which the consent of the sapindas is held to validate adoption can be extended to consent given long after the date of adoption and we think that considerable inconvenience and uncertainty would result from giving the doctrine any such further development."

The conflict in the principles underlying the text of Vasishta and the imported doctrine of consent is best illustrated in this case.

The anomalies and hardships described above clearly prove that the doctrine of sapindas' consent is not only unsound in theory but also highly undesirable in its practical application. The Privy Council easily gave an unwarranted freedom to the widow to adopt giving her the aid of a fiction of law improvised for the purpose, and, almost immediately attempted to circumscribe that freedom in all directions when they found that valuable rights, mainly those of property, are likely to be seriously jeopardised. A careful study of the original text and its proper interpretation in accordance with the Mimamsa rules would have avoided those anomalies and hardships with reference to adoptions by the Hindu widow.

At the present day, it is very rare that one seriously believes that adoptions serve any religious or spiritual purpose. As Ramesam, J., says in *Brahmayya* v. *Rattayya*[2]:

"Nowadays, most adoptions by widows are influenced by only secular motives—which generally are to benefit this relation or that body for whom the widow happens to have a partiality. My own experience is that in modern adoptions by widows almost always the spiritual motive (the welfare of the husband's soul) is absent, and the secular motive is one of affection for a particular boy among near relatives or partiality for such relations. No widow's adoption can stand scrutiny, if her motives are important."

Even as early as the Ramnad case the Judicial Committee had to justify the widow's right to adopt, in the absence of her husband's authority, on the " otherwise neglected observance of religious duty ". To such adoptions devoid of spiritual interest the sapindas are asked to lend their support; and they are cornered in a delicate and precarious situation either to

1. (1918) M.W.N. 89.

2. (1924) M.W.N. 844.

forego their right to the succession by yielding to the wishes of the widow, whose motives are presumably not above-board, or, run the risk of having their own motives called in question as selfish and improper. Further, these adoptions by widows serve, to create dissensions among the sapindas which may last for generations; for, temporal considerations being uppermost, the nearest reversioners will be slow to give their assent and the more remote, with no stake in the reversion, will be as ready to support the widow—and the result is, litigation becomes an universal feature. Again, it happens very often that the widow's husband did not entertain any idea of taking a boy in adoption, or that he disliked adoptions altogether, though he might not have prohibited his wife forestalling her future intentions; and yet, the widow may choose to make an adoption contrary to her husband's wishes and the little good that still remains in the joint family system will be wiped out by importing this stranger. Above all, it is a matter of common experience that the adopted boy growing irresponsive to higher impulses and irresponsible to kith and kin, and, maddened by his wealth alike squanders away his ill-got treasures and the fair name of his parents.

Whatever good 'adoption' might have served in the past that institution had long ceased to be commendable either socially or spiritually and the sooner it is effaced from the law of the land the better will be the growth of a healthy progressing nation. In India legal fictions like that of adoption have stamped a permanent impress upon the system of law, but in the West fictions have been discarded after they cease to be of any use, as they come to be superseded by legislation. To a Hindu fictions are living realities down to the present day, but our ancient law-givers were themselves keenly alive to the fact that they were fictions, that they cannot by any stretch of imagination be considered to represent the actual truth and that nevertheless they ought to be made use of to the best advantage in overcoming the rigidity of law. When, therefore, it is found that, on the one hand, the secular object of the fiction of adoption—namely, continuation of the lineage—is more than out-weighed by its baneful effects on society, while, on the other, its spiritual aspect is ignored and disregarded, if not entirely disbelieved, it is high time for the legislators of this day to intervene and discourage this superannuated nstitution by prohibitive legislation.

A brief examination of the development in the Roman Law of Adoption would throw a flood of light on the possible reaction, on the future of India's social progress, of the suggested supersession of the institution of adoption by legislation. As in India, the *pater-familias* of Rome resorted to the practice of adoption to obviate the dire misfortune of an extinction of his family and of his own descent to the tomb without posterity to make him blessed. If it was a *pater-familias* that was adopted the process was called *adrogatio* and if it was a *filius-familias* it was simply *adoptio*. *Adoptio* was simply to transfer the child from the one family to the other. *Adrogatio* was much more serious, for it involved the extinction of one family, that another might be perpetuated. It was therefore an affair of state. It had to be approved by the *Pontiffs*, who probably had to satisfy themselves that there were brothers enough of the adrogatee to attend to the interests of the ancestors whose cult he was renouncing; and, on their favourable report it had to be sanctioned by a vote of the *curies*, as it involved the deprivation of his *gens* of their possible right of succession to him. *Adrogatio* is thus an exact counter-part of the widow's adoption with the consent of sapindas, with this difference that the adopter in the one case is the male himself and in the other the widow.

It is curious to note how the two, the eastern and western branches of the Aryan race have developed the legal notion that presented itself to them at the threshold of their civilisation:

"Starting from an imperious necessity that a son was necessary to continue the line of his ancestry and to carry on the worship of the family Gods, the Hindu conceived the idea of adoption which to this day figures in practice as an important branch of Hindu law and works momentous changes in the joint family system of the Hindus. Starting from the same notion the Roman, with the practical eye of an accomplished jurist, saw the inconveniences and disadvantages of adoption, and originated the Law of Wills which has exerted a most powerful influence in transforming human society and in making its wheels more quicker."

The original object of the Roman "Will" was to achieve the perpetuation of the family by securing the due vesting of the *hereditas* in a person who could be relied upon to keep up the family rites; but it gradually assumed the present form of a vehicle whereby gifts are made as the last desire of the donor and for the lasting benefit of the nation at large. The end of the institution of adoption tended to the progress and

welfare of the Roman Empire and there is no reason to doubt the result if the same course is followed in India.

If it be found difficult for any reason to effect a total suppression of the system of adoption by legislation, we would urge the need of at least restricting the exercise of that power by a widow with the help of sapindas. As we have attempted to show above, the privilege of the sapindas to accord their consent is not sanctioned by ancient texts of recognised authority, is not supported by logic or utility, is given countenance to by the tribunals under a mistaken impression of enforcing the recognised law of the land, but ever since is anxiously checked and circumscribed to prevent its inroads into other spheres of law and life. As Holloway, J., observed in *Parasara Bhattar* v. *Rangaraja Bhattar*[1]:

> " Sometimes on examining a supposed rule of law embalmed in a series of decisions, it has been found to have no existence and we have not hesitated to assist in overruling those decisions. . . . . To have done otherwise would have been to fail in our duty to the public and to the science of law."

If that power to assent is removed from the sapindas it only sets the law on a firm rational basis in conformity with the ancient law of Vasishta but also serves to check the exercise of the right of adoption which is, at the present day, so freely indulged in to the detriment of society; for, then, so far at least as our presidency is concerned adoptions by widows become extinct except when they are authorised by their husbands.

Above all, if the history of ancient Rome has any useful lesson for us, we can confidently hope that even an adoption by the husband gets into disuse and in process of time runs to oblivion yielding place to bounteous charities and munificent gifts in the cause of humanity. For, laws react upon the energies and habits and indeed the whole life of a people; that laws equally react on formative ideas is abundantly established by the history of western thought: it was to the jurists, that historians, political thinkers and evolutionists owed their inspiration and method. Changes in legal institutions will bring about vital changes in ideas,—ideas that shape the progress of nations.

Solasa Sivabrahmam, B.A., B.L.,
Pleader,
Rajahmundry.

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1. (1880) I.L.R. 2 Mad. 202 at 206 .

SUMMARY OF ENGLISH CASES.

COMMISSIONERS OF INLAND REVENUE *v.* ETHEL MACLEAN CROSSMAN AND SIR EDWARD MANN, BT., AND OTHERS, (1937) A. C. 26.

Finance Act, 1894, *S.* 7, *Sub-S.* (5)—*Estate duty—Shares—Articles providing for the refusal by directors to accept a transfer without reasons—Value of such shares in open market—If special demand to be considered.*

A testator owned at his death a certain number of shares of 100*l.* each in a company which by cl. (34) of its articles imposed rigorous restrictions upon the transfer of the shares. It provided for pre-emption by the other shareholders and only after it had been offered to the existing shareholders and refused by them that it could be sold in the open market. Even then it provided that the directors may refuse to register any transfer of a share where the directors should be of opinion that the proposed transferee is not a desirable person to be admitted to membership and that without being bound to assign any reason for such opinion. The articles themselves provided also a valuation basis for the sale of the shares. The executors contended that the value of the share must be fixed in accordance with the articles. But the commissioner of Inland Revenue held that as the shares were in the testator's unrestricted possession, their value under S. 7, Sub-S. (5) must be the price which such property in unrestricted possession would fetch in the open market and not the value which a purchaser subject to all the restrictions of article 34 would give.

Section 7, Sub-S. (5) provides that "the principal value of any property shall be estimated to be the price which, in the opinion of the commissioners, such property would fetch if sold in the open market at the time of the death of the deceased".

Held, by Viscount Hailsham, L.C., Lord Blanesburgh and Lord Roche (Lord Russell of Killowen and Lord Macmillan dissenting) that what the Act has in view for the purpose of taxation is property passing on death, not the interest of the deceased, which, if it be a limited interest, can never pass. (*Vide* Cowley's case, 1899 A.C. 198.) But to value the shares on the basis that the restrictions contained in the articles were to be ignored would be to value a property which the deceased never owned and which did not pass on his death. The existence of an open market in S. 7, sub-S. (5) is not a condition of liability. It only prescribes the open market price as the measure of value. It does not define the property in respect of which estate duty is to be levied but merely affords a method of ascertaining its value. Therefore the value of the shares is to be estimated at the price which they would fetch if sold in the open market on the terms that the purchaser should be entitled to be registered as holder of the shares and should take and hold them subject to the provisions of the articles of association, including the articles relating to alienation and transfer.

Attorney-General for Ireland v. *Jameson*, (1905) 2 I.R. 218 and *Salvesen's Trustees* v. *Commissioners of Inland Revenue*, (1930) S.L.J. 387, approved.

(1935) 1 K.B. 26, reversed.

JOHN EMERY AND SONS *v.* THE COMMISSIONERS OF INLAND REVENUE, (1937) A.C. 91.

Income-tax—Business of builders—Purchase of vacant sites and building thereon—Sale of land with building—Purchase price partly in money and partly in ground annuals—Realisable value of ground annuals—If to be included in profits and gains.

A firm of builders, who carried on the business of builders and dealing in real estate, entered into a transaction by which they bought certain land, built houses upon it, and disposed of their entire interest in the land for cash and certain obligations in the nature of ground annuals which had been constituted by them in the course of the transactions. This was an obligation created in the several purchasers of the land by which the land became subject to something like a rent charge, which was not a personal obligation of the purchasers, but which was an annual charge which could be realised out of the land. This obligation is a realisable right and has a market value in Scotland.

Held, that the value of that marketable security has to be brought into account for the purpose of assessing the profits which they made in the particular years of trade. It is as though they had sold the land for money *plus* an annuity or *plus* a bond under which those sums were payable annually. The proper view of the transaction is that in effect the firm agreed to leave part of the price as a real burden on the property to the extent of its marketable value.

COUNTY COUNCIL OF THE PARTS OF LINDSEY, LINCOLNSHIRE *v.* MARY MARSHALL, WIFE OF LEWIS ALEXANDER MARSHALL, (1937) A.C. 97.

Negligence—Maternity home run by a County Council—Patient—Contagious fever—Insufficient disinfection arrangements—New patient—Not informed of the prior patient's fever—New patient contracting the fever—Liability of the County Council.

The *L* council own and control a maternity home, which is carried on by them under statutory powers. It contains 16 beds for patients. Some of these beds are in single rooms and are known as private beds for which a small fee is levied and the remaining beds are in public wards for which a smaller fee is levied. The patients in the home are attended by their own doctors and the council provide a nursing staff, three of whom are certified midwives. The council administers the home through a Maternity and Child Welfare Committee, which consists partly of the members

of the council and partly of co-opted members. That committee has a sub-committee which meets every 2 months for the management of the home. The committee is advised in the management by two doctors and the medical superintendent of the home. These doctors do not take part in any clinical duties nor in the treatment of any of the patients. In January, 1933, *M* interviewed the matron for admission for her confinement in July and arranged for a private ward. On 30th June, 1933, one Mrs. *F* was admitted to the home. She developed puerperal fever, which is a very dangerous and highly infectious disease. She was removed to another hospital and the nurses who attended on her were disinfected in accordance with the ordinary routine when a temperature case arises. A further disinfection took place after it was found to be puerperal pyrexia. The special form of disinfection for that puerperal fever was not made. On 9th July, another Mrs. *Fl* had also puerperal pyrexia. On 12th July, Mrs. *M* was admitted into the home but nothing was said to her or her husband about Mrs. *F* or Mrs. *Fl.* Next day she was delivered and 4 days later she developed puerperal fever along with 4 other patients in the home. She was removed to an infirmary and suffered a very severe attack. She thereupon filed this suit for damages.

Held, that the home ought at least to have warned the new patients or their medical advisers of the facts so that they might decide for themselves whether they would take the risk, and if so, of the precautions they would take to avoid the risk. The Council was carrying on a maternity home and was inviting prospective mothers to make use of the home for the purpose of their confinement. They therefore owed a duty to those whom they invited into the premises to make those premises reasonably safe, or if there was any hidden danger of which they or their agents were or ought to have been aware, to give the persons so invited due warning of its existence. The duty is laid by law upon the council and they are responsible in law for the mistakes of their agents. The jury found the home was in danger and the plaintiff should have been warned of the danger. It is no excuse to say that they were misled by the mistakes of the agents whom they employed.

G. W. EATON-TURNER *v.* T. MCKENNA, (1937) A.C. 162.

Income-tax—English company—Manager of—Employed in West Africa—Salary payable as per employee's directions—Salary paid in England—Employee resident in United Kingdom—Employee assessable in England.

A person residing in the United Kingdom was employed by an English corporation as manager of the corporation's mines in West Africa. His duties were to be wholly performed outside the United Kingdom in West Africa. It was a condition of the contract that payments to him were to be made as he directed and he directed the

corporation that payments should be made in England. The payments were therefore largely made by his employers to him in England.

S. 18, sub-S. (1) of the Finance Act provides "such profits or gains arising or accruing to any person from an office, employment or pension as are, under the Income-tax Act, 1918, chargeable to Income-tax under Sch. D" (with certain exceptions) "shall cease to be chargeable under that schedule and shall be chargeable to tax under Sch. E and the rules applicable to that schedule shall apply accordingly subject to the provisions of this Act". Sch. D of the Inuome-tax Act, 1918, para. 1 says:—"Tax under this schedule shall be charged in respect of: (*a*) The annual profits or gains arising (1) to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere and (2) to any person residing in the United Kingdom from any trade, profession, employment or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere". Para. 2 says that: "Tax under this schedule shall be charged under the following cases respectively; that is to say . . . Case II tax in respect of any profession, employment, or vocation not contained in any other schedule".

Held, that the assessee could be charged under the terms of Sch. D, and by virtue of S. 18, sub-S. (1) of the Finance Act, 1922, the payments were subject to income-tax under Sch. E to the Income-tax Act, 1918 in England.

Colquhoun v. *Brooks,* (1889) 14 A.C. 493, distinguished.

HARRISON (INSPECTOR OB TAXES) *v.* JOHN CRONK AND SONS, LIMITED, (1937) A.C. 185.

Income-tax—Company doing business of buying land, building on and selling—Building society—Agreement between the company and society—Profits from such sale—Result of the agreement—Liability of company to income-tax.

A company from time to time acquired areas of suitable land, made the roads and sewers, and erected small dwelling houses, to be sold to persons of small means, who are usually not able to pay more than a small portion of the purchase price. At the request of the company, a building society advanced to the purchaser on mortgage of the purchaser's interest in the house the whole of the purchase money. The company guaranteed to the building society a portion of the amount advanced. In addition to this guarantee the company was required to make a deposit with the society of the whole or a part of the sum guaranteed and on the amount of this deposit the society allowed the company a certain amount of interest. The amount deposited with the society was usually 1|3rd of the amount guaranteed. The amount advanced to the purchaser on mortgage was usually repayable with interest in 20 years by equal

monthly instalments. The title of the purchaser was completed by a deed of transfer by the company to him, in which the company acknowledged receipt of the whole purchase-price. In the company's trade account a deduction was made from the receipts from the sale of houses of the net amount deposited with the society during the year under the guarantees, that is, the sums deposited under its guarantees during the year less any sums received back during the year on the release of guarantees. The interest received on the deposits from the society was shown as a receipt in the profit and loss account but the deposits were not shown in the company's balance sheet as an asset.

The crown contended that the full amount of the purchase price should be brought into the account as a trading receipt at the time of sale and that any subsequent losses under the guarantees should be allowed when it occurs.

Held, that it would be more correct to treat the retention of the deposit as a retention of part of the nominal purchase price with the consent of the company, such sum to be applicable in reduction of the advance made by the society to the purchaser, in the event of the latter's default, any surplus going eventually to the company.

VINCENT *v.* TAURANGA ELECTRIC-POWER BOARD, (1937) A.C. 196.

New Zealand—Electric-Power Boards Act, 1925, *S.* 127—*Accident while working under the Respondent Board—Claim based on implied contract or tort—If barred by S. 127.*

The respondent Board is a corporation constituted under the provisions of Electric-Power Boards Act, 1925, and it generates and supplies electric power to consumers of electricity within its area. The appellant was a linesman in its employ and while working on 6—6—1930 in its employment, on a transformer connected with highly powered lines, he met with an accident and sustained personal injuries. On April 1, 1932, he filed a suit for damages resulting from his injuries and based his claim also alternatively (*a*) on a breach of an implied term of his contract of employment with the respondents, or (*b*) on tort, on a breach of duty owed by the respondents to the appellant as a workman in their employ. The Board pleaded that it was barred by limitation by S. 127. Section 127 provides: "(1) No action shall be commenced against the Board or any member thereof, or other person acting under the authority, or in the execution or intended execution, or in pursuance of this Act, for any alleged irregularity, or trespass or nuisance, or negligence, or for any act or omission whatever, until the expiry of one month after notice in writing specifying the cause of action has been given by the plaintiff to the defendant. (2) Every such action shall be commenced within six months next after

the cause of action first arose, whether the cause of action is continuing or not".

Held, that the action was barred. This is an action against the Board for something done or omitted to be done in the execution or intended execution of the Act. The statutory words are characterised by the utmost amplitude and they leave the plaintiff no loophole of escape and it matters not whether the claim is regarded as based on implied contract or on tort.

CHANDRASEKERA *alias* ALISANDIRI *v.* THE KING, (1937) A. C. 220.

Criminal Law—Murder—Dying declaration by signs—Deceased unable to speak as throat injured—Nodding to a direct question re-identity of murderer—If admissible in evidence—Ceylon Evidence Act, 1895, *S.* 32.

The deceased, a widow of about 42 years of age, was living in a two-roomed one storied house. Between 2 and 3 P.M. on the day of murder, the accused was seen near the deceased's house in conversation with her. Between 3 and 4 P.M. he was seen riding on a bicycle away from that locality and behaving in a suspicious and excited manner. He then bathed in a stream and went back on a cycle to his place of business. At about 4 P.M. the deceased ran in a terribly wounded condition to a bungalow about 150 yards away. There she was bandaged and propped up against a wall. The wound rendered her unable to speak but she was fully conscious and able to understand what was said to her, and to make signs and to nod her head, though slightly. She was asked questions, the course and result of which was as follows:—Asked as to who cut her neck, the deceased indicated by signs the height of the person and later pointed to a gentleman *J* and made signs as of goading a bull. The accused had worked for *J* as a carter. She also pointed to a constable and then slapped her cheek 2 or 3 times. The accused had some time before assaulted a constable by slapping his face. At this stage one Mr. *P* put a direct question and asked her if it was *A* (the accused that did it. The deceased nodded her head in answer by way of assent. She was removed to the hospital and died there.

Held, that evidence as to signs made in answer to questions put to the deceased is admissible but the statements of witnesses as to what interpretation they put upon the signs is not admissible. The word used in the section is *verbal* and not *oral*. The case closely resembles the case of a person who is dumb and is able to converse by means of a finger alphabet. Upon proper evidence proving the words used in a conversation so held, a statement so made would be a verbal statement within the meaning of the section. The question of Mr. *P* and the nod of assent also constituted a verbal statement made by her and was admissible in evidence. The material provisions of the Ceylon Evidence Act, S. 32, is held

by their Lordships to be identical with the provisions of the Indian Act.

Queen-Empress v. *Abdullah*, (1885) I.L.R. 7 All. 385, approved.

In re A DEBTOR, (1937) 1 Ch. 92.

Bankruptcy—Solicitor for the debtor—Payment of moneys to—Payments some before receiving order and some after—Payments made before can be retained only so far as have been properly allotted or disbursed for defending petition—Later sums cannot be retained by the solicitor.

The debtor paid 50*l.* to the respondents, who were the partners in the firm of solicitors who acted for the debtor, before the date of the receiving order for expenses in opposing the bankruptcy proceedings. After the date of the receiving order the debtor paid the respondents further 75*l.* for the expenses of an appeal against the receiving order, 20*l.* being to provide the security which a debtor must lodge as a condition of appealing against a receiving order. The Official Receiver asked them to pay the latter 75*l.* and such portion of the first 50*l.* as was not required to meet the expenses up to the date of the receiving order.

Section 37, sub-S. (1) of the Bankruptcy Act, 1914, provides:—The bankruptcy of a debtor . . . shall be deemed to . . . commence at the time of the act of bankruptcy being committed on which a receiving order is made against him . . . ."

Held, that to permit the solicitors to retain the sums paid after the receiving order will be to sanction security for costs of an appeal being lodged by the debtor out of the fund which would necessarily, in view of the receiving order having been made, be monies of the Official Receiver applicant. As for the expenses of defence of the debtor against bankruptcy proceedings it has been the practice to approve of the trustee permitting the solicitors to retain so much of the sums paid by the debtor as has been properly disbursed or allotted for the purpose for which it was paid. This practice cannot be extended to apply to the costs of supporting an appeal.

In re MAINWARING: MAINWARING *v.* VERDEN, (1937) 1 Ch. 96.

Mortgage—Mortgage on two properties—Sale of one subject to the mortgage—Liability of purchaser to pro rata *contribution.*

Where a vendor is entitled to two properties subject to one mortgage, and he sells one of them and in the conveyance that sale is expressed to be subject to the mortgage, and no reference is made to what is to happen, as between the parties to that deed, to the property retained by the vendor in relation to the mortgage, then so far from an equity, arising which would result in throwing

the whole of the burden upon the purchaser, the equity remains an equity to apportion the burden of the mortgage as between the two properties. There is no exception to this rule in the case where the vendor himself of one of the two mortgaged properties is the person who is under the personal obligation to pay the debt to the mortgagee. If the document did not say that the sale was subject to the mortgage the position may be different but where the document itself says it is subject to the mortgage it means that the assignee is also to bear his rateable portion of the mortgage. Therefore as between the vendor and the purchaser there is a right of contribution in proportion to the properties.

In re R. GERTZENSTEIN, LIMITED, (1937) 1 Ch. 115.

Companies Act—Companies (Winding Up) Rules, 1928, *R*. 158 *—Joint liquidators one of whom is a solicitor—Solicitor liquidator acting as solicitor for the joint liquidators—If entitled to profit costs.*

A company went into liquidation and two liquidators were appointed, one a chartered accountant and the other *B* a solicitor. They took up some proceedings impeaching certain transactions between the company and other persons on the ground of fraudulent preference. In those proceedings *B* acted as solicitor for himself and the co-liquidators. The matter was compromised and it was ordered by consent that among other things the respondents should pay the liquidators their costs, such costs to be taxed. The bill of costs put in by *B* included his profit costs.

Held, that there is between the joint liquidators on the one side and the shareholders or creditors of the company on the other a fiduciary relationship which prevents the liquidators making a profit out of their trust. That fiduciary relationship would prevent a liquidator who is a solicitor from getting ordinary profit costs of non-litigious legal business done by him as solicitor. But where the solicitor trustee acts as solicitor for himself and his co-trustees as in *Cradock* v. *Piper,* 1 Mac. & G. 664, he is permitted profit costs in an ordinary trust case. But R. 158 of the Companies (Winding Up) Rules prohibits the solicitor liquidator from charging profit costs and so he cannot be allowed the costs.

The Companies (Winding Up) Rules (1928), R. 158 says: "Except as provided by the Act or the Rules, a liquidator shall not under any circumstances whatever, make any arrangement for, or accept from any solicitor, auctioneer, or any person connected with the company of which he is liquidator or who is employed in or in connection with the winding up of the company, any gift, remuneration, or pecuniary or other consideration or benefit whatever beyond the remuneration to which under the Act and the Rules he is entitled to as liquidator nor shall he make any arrangement for giving up any part of such remuneration to any such solicitor, auctioneer or other person".

THE KING *v.* FRANK SHERIDAN, (1937) 1 K.B. 223.

Criminal Law—Autrefois convict—*Trial by petty sessions—Finding of guilty and conviction by—Yet sentence not pronounced—Committal to sessions—Plea of* autrefois convict *at quarter sessions—Good plea.*

The accused was convicted at the quarter sessions for the borough of *S* upon two counts (1) obtaining goods from *T* by false pretences and intent to defraud and (2) with obtaining credit from *P* under false pretences or by means of fraud other than false pretences contrary to S. 13 of the Debtors Act, 1869. The accused was originally charged at the petty Sessional Court with only the second offence. That offence is one of those which can be tried summarily with the consent of the accused. The accused consented to summary trial but pleaded not guilty. At the close the justices held that he was guilty. Then certain previous convictions were proved and then the justices declared that they would not deal with the case but would commit the accused for trial at quarter Sessions.

Held, that this was a case of *autrefois convict* for the second count. The accused was convicted at the Sessions by a Court of competent jurisdiction of precisely the same offence and upon precisely the same facts as were relied upon in support of this count. It is not necessary to support that plea that there should be a *sentence.* It is the finding that the accused was guilty that is the *conviction* for this rule and on that *sentence* is to follow.

Reg. v. *Blaby,* (1894) 2 Q.B. 170 and *Reg.* v. *Miles,* (1890) 24 Q.B.D. 423, followed.

Held, that on the first count the jury must be directed that intent to defraud is an essential part of the case to be proved by the prosecution.

LEDWITH *v.* ROBERTS, (1937) 1 K.B. 232.

Tort—False imprisonment—Arrest by constables on suspicion without warrant—Arrested person bona fide *suspected of attempting to commit a felony—Loitering at the place—Arrested person not belonging to a class of already suspected persons or reputed thieves—Vagrancy Acts—Liverpool Corporation Act,* 1921, *S.* 513—*Loitering in S.* 513, *meaning of.*

L and *C* were two young men under 21 years of age. Both of them were window cleaners. The defendants were constables. One day *C* entered a telephone kiosk to receive a call and *L* stood waiting outside. The defendants came to the said kiosk and arrested *L* and *C* on suspicion and after some time let them off. *L* and *C* thereupon brought this suit for damages for false imprisonment and the defence of the constables was that the plaintiffs were for a period of 25 minutes kept under observation by the defendants and that the defendants, having as a result of such observation

reasonable and probable cause for suspecting that *L* and *C* were to commit theft from the coin box at the telephone kiosk, arrested them and detained them until the completion of enquiries. There was no allegation in the defence that either of the plaintiffs was a suspected person or that he was an idle or disorderly person.

Vagrancy Act, 1824, S. 4 provides that "every suspected person or reputed thief frequenting any river, canal or navigable stream . . . or any street, highway . . . or any place of public resort . . . or any street highway or place adjacent, with intent to commit felony" apprehended by a constable or police officer shall be deemed to be a rogue and vagabond and therefore punishable as provided by the statute. S. 7 of the Penal Servitude Act, 1891, extends this S. 4, Vagrancy Act, 1824, to every suspected person or reputed thief loitering about or in any of the places mentioned in the 1824 Act. The Liverpool Corporation Act, 1921, provides that "it shall be lawful for any police constable and all such persons as he shall call to his assistance to arrest and detain without warrant . . . ; (2) any loose idle or disorderly person whom he shall find disturbing the public peace or whom he shall have good cause to suspect of having committed or being about to commit any felony misdemeanour or breach of the peace or to instigate or abet any such breach; (3) any person whom he shall find between sunset and the hour of eight in the morning lying or loitering in any street, yard or other place and not giving a satisfactory account of himself".

Held, that the special powers given to constables under Vagrancy Acts are confined to a class of persons described as "suspected persons" or "reputed thieves". They can only be apprehended without warrant if they already are at the time of their arrest and imprisonment suspected persons or reputed thieves. It does not mean that if the constable suspects the person whom he apprehends he is entitled to arrest and imprison him without warrant. "Suspected person" means a person who has acquired the character of a suspect and does not mean every person whom the apprehending constable suspects to be loitering with intent to commit a felony. So far as S. 513 of the Liverpool Corporation Act is concerned it must be established that the person apprehended belonged to the class of loose, idle or disorderly persons. The power to apprehend does not arise where all that can be proved is that the constable honestly believed on reasonable grounds that the person apprehended was a loose idle or disorderly person. 'Loitering' does not mean 'standing or waiting in the street' but it means loitering in such a way as to indicate that the person was idling in the street for some unlawful purpose.

KIRK *v.* EUSTACE, (1937) 1 K.B. 278.

Husband and wife—Separation deed between—Mutual covenants—Covenant by husband to pay weekly maintenance during

wife's life—Death of husband—If liability to pay enures even after his death.

A deed of separation dated 1922 made between the husband and wife provided that they had agreed mutually to live apart from each other for the future, and the husband agreed to pay the wife weekly 2*l.* during her life maintenance subject to the provisos and conditions contained therein. It provided that in case they "should any time thereafter with their mutual consent co-habit as man and wife, then and in such case the weekly sum of 2*l.* should be no longer payable and all the covenants hereinbefore contained should be void". There was no reconciliation between the partners. The husband was paying the 2*l.* till his death in 1936 leaving a will. The wife claimed that she was entitled to it even after her husband's death.

Held, by Slesser and Scott, L.JJ. (Eve, J., dissenting) that the language of the deed, when properly considered, shows an intention to base the whole contract on the assumption that the parties, as is recited; have mutually agreed to live apart from each other. Such a basic condition involves the necessity, if the contract is to operate, that both parties are living at any time when it is sought to enforce the deed and they cannot be said to be living apart within the meaning of the agreement when one of them is dead. As such the contract came to an end on the death of the husband and the covenant to pay maintenance also went with it.

In re *Gilling; Procter* v. *Watkins,* (1905) 74 L.J. (Ch.) 335, followed.

Per *Eve, J.*—The covenant to pay the wife 2*l.* during *her life* remained for her benefit notwithstanding the death of the husband. The terms of the document were plain and unambiguous and it did not state that the husband should be living for the purpose.

JOTTINGS AND CUTTINGS.

Law Society Meeting: The Council.—Continuing our account of the papers read at the fifty-second Provincial Meeting of the Law Society, held at Nottingham, on the 22nd and 23rd of last month, we give hereunder summaries of the last three papers. A full report of these appears elsewhere in the present issue. Mr. Dingwall L. Bateson began by saying that it was not many years since the title to his paper "The Work of the Council of the Law Society" would have been generally held, though quite wrongly, to contain a contradiction in terms, because it seemed to have been commonly believed by members of the profession that the Council, in fact, did no work. Recently, however, there appeared to have arisen a much greater interest in the Council and its operations, as a result of which it was thought by members of the Council that the paper could be read with some likelihood of appreciation. The speaker dealt with the qualification and election of president, vice-

president and members of the Council, and the number of the latter with the proportion of provincial solicitors normally serving thereon, with the meetings of the Council, its statutory duties and the committees by which they are discharged. In regard to its origin, he emphasised that the Law Society was originally, and still is, a private institution. It came into being in 1739, although not established until 1825 as a society. Reference was made to the Solicitors Acts of 1933 and 1936, both promoted by the Council, and to the work of the Examination, Parliamentary, Finance, Scale, and Professional Purposes Committees. On the relationship subsisting between the Law Society and the Provincial Societies, it was pointed out that the latter, both directly and through the country members of the Council, not only send to the Council a great deal of the material with which the Council has to deal, but in all matters of paramount importance act as general advisers to the Council, so as to keep London in touch with the feelings and view of the country. The speaker concluded by urging the desirability of the general members of the profession attending the annual general meetings in London during July and the special general meetings in January. He cited a case where an advertised resolution put by a solicitor in the hall was voted upon "by the grand total of less than twenty persons," adding, "you will doubtless agree that this cannot properly represent the opinion of the profession on any subject." He reminded his hearers that the Press attended these meetings, which were reported as if they were representative, and he asked as some return for the work which the members of the Council do for them to come in future to the half-yearly meetings and bring their friends in the profession with them.—*S.J., 1936, p. 781.*

Penalties for Motoring Offences.—The circular just issued by the Home Office dealing with the need of greater uniformity in the treatment of those convicted of motoring offences contains some highly significant figures derived from the return of offences relating to motor vehicles presented to Parliament last May, which showed that during 1935 the total number of such offences for which convictions were recorded in England and Wales was 341,852. Disregarding, for the purpose of comparing one area with another, districts where the total number of convictions for a particular offence were less than thirty during the year, it appears that out of the total number of convictions for driving under the influence of drink, etc., 70 per cent. resulted in the offenders' licences being suspended, but that the proportion varied between 91 per cent. in one district and 36 per cent. in another. In the case of convictions for driving recklessly or dangerously the total, higest, and lowest percentages of disqualifications were respectively 36, 65 and 15. Corresponding figures relating to endorsements for careless driving were forty-seven, ninety-six and nil. The

most remarkable divergence is recorded in the case of disqualifications for failure to insure against third party risks where the percentages were 38, 100 and 4. The circular sets out the law on the subject (which need not be repeated here), and while recognition is accorded to the desirability of the Courts of summary jurisdiction making proper use of the discretion vested on them in dealing with individual offenders, as also to the fact that it is not to be expected that there should be any precise uniformity of practice throughout the country on the question whether or not an offender's licence ought to be suspended or endorsed on his conviction, it is intimated that the differences of treatment disclosed by the figures are not to be accounted for merely by the circumstances of the individual cases dealt with at the different Courts. "There must", it is said, "in particular be some fundamental difference of opinion as to what constitutes a 'special reason', with the result that the same offender if convicted in one area may expect that his licence may be suspended or endorsed almost as a matter of course, while in another area he may almost count on the Court ordering otherwise". The suggestion that a "special reason" is to be found in the generality of cases is negatived, and the clear intention of Parliament that suspension or endorsement of the offender's licence should follow in the absence of such invoked; and, while it is recognised that what constitutes a "special reason" in a particular case must necessarily be left to each court to decide, having regard to all the circumstances, the Home Secretary urges that the matter be considered with a view to determining whether existing practice in the various Courts concerned is in full accord with what Parliament intended.—*S.J., 1936, p. 783*.

Reform in the Law Courts.—That all is not well in the working of the judicial machine is obviously the considered view of the writer of the article in *The Times* of last Saturday, bearing the heading, "Reform in the Law Courts", wherein he incidentally ventures to hint that not infrequently hearings are protracted unduly by the fact that judges are apt to forget that counsel are there to argue before them, and not with them. Certainly some judicial dignitaries fail to keep in mind the wise words of Lord Chancellor Bacon, that "an over-speaking judge is no well-tuned cymbal". The writer's main thesis, however, is that at the moment the Court of Appeal is overburdened, and that the effort which has been made to cope with the extra work cast upon it by recent legislation and administrative changes has only resulted in the periodical requisitioning of one or more of the puisne judges to man a third Court of Appeal. Is there any remedy for this state of things? The writer of the article referred to puts forward the suggestion that appeals from county courts, which recently were transferred from the King's Bench Division to the Court of Appeal, should be re-transferred to the Divisional Courts. In the past a

grave objection to the hearing of these appeals in the King's Bench Division was the fact that the court was constituted of two judges only, with the possibility, which occasionally was realised in fact, of a divergence of judicial opinion and the dismissal of the appeal. If the suggestion that county court appeals should be re-transferred to the King's Bench Division, the Divisional Court appointed from time to time to hear them should certainly be constituted of three judges, and their decision should be final. There must be an end of litigation somewhere, and in county court cases, important as some of them are, a double hearing, once before the county court judge, and then by a court consisting of three judges of the King's Bench Division, should be held to be sufficient. If Parliament continues to increase the work of the appellate courts, it is obvious, unless reforms somewhat on these lines are carried out, that instead of the occasional sitting of what without disrespect may be called a scratch third court, it will be necessary to set up a permanent third section of that tribunal.—*S.J., 1936, p. 825.*

One Hundred Miles an Hour.—An aspect of the road problem with which we have not hitherto specifically concerned ourselves in this column formed the subject of the very interesting presidential address which was delivered by Capt. J. S. Irving at a meeting of the Institution of Automobile Engineers last Tuesday week. Our concern with the problem is naturally confined to its legal side, whether legislative, administrative or judicial, and if we now allude to the feasibility of making suitable provision for the general attainment of a far higher road speed than is possible under existing conditions, it is because this aspect of the problem appears likely in the near future to assume practicable importance, with consequent repercussions in the legal sphere. In the course of the address just alluded to, the speaker urged that the main highways should be designed to allow of speeds of at least 100 miles an hour, and that it should be possible to maintain this speed for long periods. The majority of the motoring public, he said, had no objection to speed as such, but only to the hazards of the present road and traffic conditions which rendered high speed unsafe. Where suitable roads and conditions were available the general public would accept an average of 75 to 100 miles an hour with less fuss than they did the present arterial road average of about 40 miles an hour. Speeds of 100 miles an hour at Brooklands were infinitely less exciting than 40 miles an hour on some of our roads. The speaker recognised that a high degree of concentration on the driver's part would become necessary at the higher speeds contemplated in view of the fact that with the normal human reaction, which he stated was approximately 0·4 of the second, a distance of at least 58 feet would have been traversed at 100 miles an hour between thought and action under emergency conditions,

even if no further lag was caused by the driver's inattention. The speaker advocated the provision of roads suitable for such speeds. On properly designed roads, he said, it should be almost impossible for accidents to happen unless caused by gross negligence on the part of the drivers. The only possible action on the part of the Government was to take such steps as would facilitate this development instead of attempting to hinder progress by restrictive and irritating regulations. He urged that the great advantage of the new highways would be that emergency conditions would seldom arise, while the strain of driving at the higher speed envisaged would probably be less than that now experienced under present conditions at less than half the speed.—*S.J., 1936, p. 826.*

The Limits of Progress.—We are far from endorsing all the remarks made by the speaker whose address forms the subject of the foregoing paragraph, but they present, not for the first time, a point of view which has the merit of seeking a solution by other than purely restrictive means. It might be thought that human ingenuity which has developed the internal combustion engine to its present pitch of efficiency would be equal to the task of providing by roads full opportunities for its exploitation. In practice, however, it is only too common to find progress, particularly mechanical progress, in one direction stultified by impossibility of advance in another. That advance in road planning is possible cannot be doubted. Whether that advance is capable of being brought to the stage where a road speed of 100 miles an hour could be permitted with safety, proper provision being made *inter alia* for ingress and egress, is quite another matter. It is still more doubtful whether such roads, granting their possibility, would be equal to providing opportunity for the full exercise of such further progress as may be made in engine design, and if they did not the era of restriction would have dawned once more. Moreover, there are considerable practical difficulties. The provision of such roads would appear to involve far greater expenditure than any hitherto devoted to the purpose. Highways of the type contemplated would necessarily run as far as possible straight from one place to another, and apart from costly engineering works the sums which would have to be discharged by way of compensation for lands compulsorily taken would, if due regard were paid to the rights of the owners, be enormous. The provision of roads suitable for high speeds, though not necessarily as high as Captain Irving contemplated, is, however, plainly desirable, not the least from the point of view of road safety, and in this connection real improvement may, it is thought, be expected with some confidence from the taking over by the Ministry of Transport of the main traffic routes of the country.—*S.J., 1936, p. 826.*

"Per Pro." Again.—In the issue of *The Times* of the 13th inst. a letter appeared in which Mr. Robert C. Paterson, writing from the head office of the National and Provincial Bank, referred to the correct position of *per pro.* in an ordinary procuration signature. Bank officials, he claimed, while laying no special claim to eminence in classical studies, were not entirely ignorant of the meaning of *"per pro."* or *"p.p."* and he quoted Thompson's Dictionary of Banking, where it is said that "lawyers sometimes place the *per pro.* before the name of the agent, but this form is not recognised by bankers who require that the *per pro.* should precede the name of the principal". Mr. H. W. Fowler, in his admirable "Modern English Usage", after noting that *per pro.* is an abbreviation of *per procurationem,* by the agency of the proxy, continues, "the signature should therefore be immediately after *per pro.,* the principal's name standing either before *per pro.* or after the agent's name." Some year or two ago a correspondent in *The Times* wrote complaining that when he signed a cheque in the way thus advocated his banker threatened to return it unpaid unless he placed the *per pro.* before the principal's name in the usual mercantile way. On the "proper form of a definite *per pro.* signature", Sir James Paget, in his Law of Banking, says that "'*Per pro.* James Brown, John Smith,' is said to be correct. 'James Brown, *per pro.* John Smith,' is said to be wrong. And yet, if the object is, as it must be, to get as near an actual signature as possible, one would think the latter form the more appropriate, as meaning, 'This is the signature of James Brown affixed by his authority by me, John Smith,' whereas the former might fairly be interpreted, 'By the authority of James Brown I sign myself John Smith.'" The A.B. *per pro*. C.D. sequence is, Sir James adds, the form common in Scotland and Canada.—*L.T., 1936, p. 284.*

A Few Cases.—Glancing at a few of the cases in which *per pro.* signatures have come before the Courts, we find that in *Attwood* v. *Munings* (1827) bills were "accepted *per procuration* of G.G.H. Munings—S. Munings"—Sarah Munings being the wife and agent of G.G.H. Munings, the principal—whilst in *Stagg* v. *Jacobs* (1862), the same sequence was observed, yet in neither case was there any suggestion that there had been any formal irregularity. On the other hand, as Sir James Paget notes (*loc. cit.*) in *Charles* v. *Blackwell* (1876), "the very case to which bankers owe the extension of their immunity under sect. 60 to '*per pro.*' indorsements", the abbreviation occurs between the two names—"Smith and Co., *per* S. Kingsford, agent"—not before that of the principal. In *Leadbitter* v. *Farrow* (1816), Lord Ellenborough treated *"for* another" and "by procuration of another" as equivalent words of exclusion, showing that the person signing did so "as a mere scribe", and this recalls a question quoted by a contributor in our issue of

April 13, 1935, "Why use this abbreviation at all, when the English word 'for' performs with exactitude the same function as the Latin term?" English business men, however, will hardly relinquish the shadow of Latinity evidenced by the abbreviation in question—although it is reduced to "*per*" or even to "*p.p.*"—and as custom is on the side of the banks, and they have, so to say, the whip hand when a cheque is presented for payment, we shall probably see "*per pro.* James Brown, John Smith" on bills and cheques for many years to come.—*L.T., 1936, p. 284.*

Judicial Patronage.—Although in the matter of appointments to the judicial bench it is generally known that the Lord Chancellor has not what may be called exclusive jurisdiction, seeing that in respect of those destined to fill the more exalted posts in the judicial hierarchy the Prime Minister has the determining voice, it is rarely that we find anything in the nature of a formal public statement to this effect. It is, therefore, interesting to note that Lord Hailsham, in his recent address to the members of the Holdsworth Club, at Birmingham, on "The Duties of a Lord Chancellor", dealt with this matter by saying: "Actually the Lords of Appeal and Lords Justices are appointed by the Prime Minister, but without betraying Cabinet secrets I can tell you that the Prime Minister in a matter of legal patronage usually consults his Lord Chancellor as to the most suitable person to appoint". Whether this has invariably been the case is not known, but it would appear to have been the practice all the time the present Prime Minister has been in office. In Sir Charles Mallet's admirable memoir of the late Lord Cave are preserved one or two letters passing between the latter and Mr. Baldwin on the subject of judicial appointments. In 1923 the Prime Minister had three important appointments to suggest—Lord Justice Younger as a Lord of Appeal, Mr. Justice Sargant as a Lord Justice, and Sir Ernest Pollock as Master of the Rolls, and with regard to these he wrote to Lord Cave in these terms: "I should not like to make a legal appointment that had not your concurrence. Perhaps you would wire me as soon as you conveniently can, if you approve, and I will forthwith communicate with them. But if you are in any way not satisfied, write. If you agree, it will remain for you to appoint one Chancery judge". Obviously the Lord Chancellor approved of the suggestions, for all three were duly appointed.—*L.T., 1936, p. 290.*

Appointment of Puisnes.—While, as we have seen, the Prime Minister, though having the right to nominate whom he will for the higher judicial offices, chose, at all events in the case of Mr. Baldwin, to secure the approval of the Lord Chancellor, conversely the Prime Minister liked to be consulted on the appointments to the ordinary judgeships. This claim, if so it can be called,

was very considerately expressed by Mr. Baldwin in another letter to Lord Cave, where he said: "Though it is not my business, I should be grateful if you would tell me what is in your mind as to promotions to the Bench before you finally make the offers. Could we have a chat next week, and then we could go over any higher promotions that may be coming along". The like courtesy has apparently not always been observed in the communications between the Prime Minister of the day and his Lord Chancellor. According to Campbell, an instance occurred during the Chancellorship of Lord Eldon when the Prime Minister laid before the King the name of a member of the Bar whom he proposed to appoint as a puisne judge. At this Eldon, always jealous of his prerogatives, protested vehemently at an encroachment on his rights, and declared that he would send in his resignation if the name were not withdrawn. Thereupon the Premier capitulated and the candidate proposed by Eldon was given the post. When the partition of authority in making appointments took place appears to be by no means clear, but that the Prime Minister has long had a determining voice in the high offices is clear. The heads of the old common law courts were in his gift, or, to be more accurate, a power of nomination equivalent to a *conge d'elire,* and along with these came to be linked the higher offices created during the last century. A curious circumstance in connection with the nomination for the post of a Lord Justice occurred during Mr. Gladstone's premiership. One of the names submitted to him for the vacancy was that very distinguished lawyer, George Mellish. When the Prime Minister saw the name he asked: "Can that be the boy who was my fag at Eton?" During the intervening years he had not even heard of the continued existence of his former fag, and we can well appreciate how Mr. Gladstone would rejoice in giving the post to Mellish. As it happened, no better choice could have been made, for Mellish was a consummate lawyer. As one who knew him well, the late Lord Bryce, said: "One felt as if the voice of pure reason were speaking through his lips". Sitting as he did with Lord Justice James, the profane spoke of them, especially in reference to their rapid disposal of their work, as "Flames and Hellish". Such is the way of the young to rail at dignities!—*L.T., 1936, p. 290.*

Lord Stowell.—It was singularly fitting that the address in commemoration of the centenary of Lord Stowell (1745—1836) before the University of Oxford should have been delivered by Viscount Sankey, seeing that he holds at the moment two of the offices which were held by Stowell in his day, namely, that of High Steward of the University, and that of Treasurer of the Middle Temple. The address, of which a limited number of copies has been printed in an attractive format prefixed by an excellent reproduction of the portrait of Stowell by Thomas Phillips, R.A., but for private circulation only, is a worthy memorial of the great lawyer who

expounded as none before him had done with so much learning the principles of Admiralty and Prize law, and embodied them in a series of decisions which provided an inexhaustible quarry to which our jurists had continual recourse to meet the exigencies which the Great War raised. It is well to remember, however, that Stowell was not only a great judge of international reputation, but was likewise a scholar and a ripe good one. As is well said by Lord Sankey, "the life of a lawyer is of no particular interest to the general public unless he indulges, so to speak, in some side-line, as, for example, in the case of Eldon, politics; or Haldane, philosophy and organisation; or, unless like Brougham, he is one of those peculiar people who do not believe the law is the true embodiment of everything that is excellent, and who wish to reform it". Lawyers, however, are proud of Stowell, not merely by reason of his distinction as a judge of surpassing excellence; but, further, because, as coming within the ambit of the Johnson circle, he is honourably mentioned time and again in the pages of Boswell, and to have one's name inscribed there is, as Thackeray remarked of the tribute to Fielding in Gibbon, "like having it written on the dome of St. Peter's. Pilgrims from all the world admire and behold it".—*L.T., 1936, p. 310.*

Judicial Idiosyncrasies.—Even some of those who, on the judgment seat, have acquitted themselves with acceptance, have their claim to the remembrance of posterity based rather on some personal idiosyncrasy or by having been the butt of some contemporary with than upon their legal erudition. Sir Lancelot Shadwell, for example, who had the distinction of being the last to bear the judicial title of Vice-Chancellor of England, and who had the further distinction of being the father—by two wives it is true—of no fewer than seventeen children, was, according to Foss, an excellent judge; but even he had his critics, who used to say that on the Bench he was apt to be dominated by some of the leading counsel who appeared before him, and, in particular, by the future Lord Westbury. To this circumstance was due the riddle, "Why is Shadwell like King Jeroboam?" the answer being "Because he has set up an idol in Bethell". Another anecdote, which, however, seems to be one of those to which the epithet *ben trovato* is applicable, is to the effect that on being asked if a judge feels very anxious when he has to decide questions in relation to property of large amount, he replied: "Not at all; one or other of them must have it. What does it signify which?" It was in reference to this story that a humorist wrote Shadwell's epitaph while he was still alive, in these terms: "Here lies Sir Lancelot Shadwell, sometime Vice-Chancellor of England. What does it signify?"—*L.T., 1936, p. 311.*

BOOK REVIEWS.

THE LAW OF PATENTS IN INDIA by E. Charles Ormond, Advocate, High Court, Calcutta, with a foreword by the Right Honourable Lord Atkin, 1936. Published by Eastern Law House, Calcutta. Price Rs. 12-8-0.

There is, so far as we are aware, no other work in this country on the subject of Patent Law and we cordially welcome the appearance of this treatise at a time when industrialisation has been largely engaging the attention of our country. This work is not one written in language which is intelligible to lawyers alone. It is written in such popular style which even a lay reader will find it a pleasure to read and understand. The merits of the book as a legal text book are not in the least detracted but enhanced by this manner of treatment. The whole range of points arising in this topic have been dealt with in all their fullness and with precision in the various chapters giving references to all the relevant decisions. In the words of Lord Atkin who has written a foreword to the work "the author has spared no pains to make the book a complete exposition of the Law of Patents in India. The Indian statutes have followed closely but not slavishly the corresponding English law and it is obviously impossible to expound the Indian law without a knowledge of the English statutes and decisions. The writer appears to have mastered the history and principles of the English law: and his interpretation of the Indian law is fortified by full quotations from English cases on corresponding problems, and by pointed references to distinctions between the two Codes where they exist. This is obviously a book into which the author has put unremitting labour and skill. It is likely to prove a necessary part of the equipment of persons in India interested in patents, lawyers and non-lawyers alike, and I cordially recommend it." After these words of Lord Atkin in praise of this work, any commendation by us will be superfluous.

LECTURES ON COMPANY LAW by Shatilal M. Shah. Published by The Popular Book Depot, Bombay, 1937. Price Rs. 3-8-0.

This is a treatment of the Indian Company Law in the shape of lectures arranged according to the natural order of the topics. This book will be useful for getting a clear idea of the whole subject for a beginner before he goes into the more conprehensive works. for a beginner before he goes into the more comprehensive works. the course of the lectures. We recommend this book for a clear understanding of the subject at the outset for students, lawyers and businessmen.

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NOTES OF RECENT CASES.

Madhavan Nair and Stodart, JJ. A. S. No. 354 of 1932.
18th December, 1936.

Succession—Mutt and Matadhipathi—Office of—Right of succession to—Usage of institution—Mourasi Mutt—Nature of—Nomination—Significance of.

R, the last Mohant of the Haradakhandi Mutt in the Ganjam district duly constituted the defendant as chela in 1910. Subsequently as certain dissensions arose between himself and the defendant, *R* purported to constitute in 1926 the plaintiff and two others as chelas and performed their chela bidhana ceremony: and in October, 1926, executed a will wherein he nominated the plaintiff as his successor. *R* died in 1927. When both the plaintiff and the defendant claimed the right to succeed to the mohantship the Divisional Magistrate attached the Mutt under S. 146, Criminal Procedure Code, and the Hindu Religious Endowments Board appointed a trustee under S. 42 of the Hindu Religious Endowments Act. The plaintiff thereupon instituted the present suit to establish his right to succeed to the Mutt on the ground that the Mohunt had the right to nominate his successor by selecting any one from among his several disciples. The defendant on the other hand contended that the suit mutt belonged to a class called the mourasi and in such mutts the senior chela succeeded as of right, and the Mohunt had no right to supersede the senior chela except when he is disqualified for any reason according to the sastras.

Held, that the succession to the office of a Mohant depends on the usage and custom of each particular mutt which is to be proved by testimony.

I.L.R. 43 Cal. 707 (P.C.), followed.

The suit mutt belonged to a class of mutts called the 'Mourasi' where the principle of hereditary right was the rule of succession.

That in case of mourasi mutts the senior chela was entitled to succeed and the Mohant has no absolute right of selection from among his chelas to select any one whom he pleases.

6 S. D. A. Beng. 262 referred to.

In the case of hereditary succession, nomination, though usually made, is a mere formality which has no significance.

51 M.L.J. 258, followed.

The Advocate-General, B. Sitarama Rao, Ch. Raghava Rao and *K. Subrahmaniam* for Appellant.

T. R. Venkatarama Sastriar, P. V. Rajamannar and *B. V. Ramanarasu* for Respondent.

S.V.V.

Burn, J. S. A. No. 133 of 1933.

18th December, 1936.

Delivery of possession in execution of decree—Purchasers pendente lite *not actually dispossessed—Separate suit by the decree-holder within 12 years—Bar of S. 47, Civil Procedure Code—purchasers* pendente lite *representatives of the judgment-debtors within the meaning of S. 47, Civil Procedure Code.*

The plaintiffs obtained a decree on 23rd December, 1920, for foreclosure against the mortgagors who sold the mortgaged properties during the suit to the defendants in the present suit. The plaintiffs' petition to implead the purchasers *pendente lite* in the foreclosure suit was dismissed. The plaintiffs in execution of the foreclosure decree obtained a paper delivery on 23rd April, 1922, by which the purchasers *pendente lite* who were in actual possession were not dispossessed.

The present suit was brought on 19th July, 1926, for recovery of possession from the purchasers *pendente lite.* The defendants pleaded S. 47 as a bar, as the plaintiffs were bound to obtain possession in execution.

Held, that the purchasers *pendente lite* were representatives of the judgment-debtor within the meaning of S. 47, Civil Procedure Code, and the present suit for possession is therefore barred by that section.

I.L.R. 52 Bom. 208, distinguished.

I.L.R. 55 All. 235, followed.

Ch. Raghava Rao for *V. Govindarajachary* for Appellants.

A. Lakshmayya for Respondents.

S.V.V.

Chief Justice and Stodart, J. C. M. A. No. 97 of 1934.

5th January, 1937.

Provincial Insolvency Act (V of 1920). Ss. 3, 4, 53 and 54—Application by Official Receiver to set aside mortgages executed by

insolvent—Transfer of application by District Court to Sub-Court within whose limits the insolvency did not occur—Mortgages set aside by Sub-Court—Transfer ultra vires—*Proceedings to be set aside,*

A debtor was adjudicated insolvent and the Official Receiver filed an application to set aside two mortgages executed by the insolvent in favour of the appellant under Ss. 4, 53 and 54 of the Provincial Insolvency Act. The District Court transferred the application to Sub-Court beyond whose local limits the insolvency occurred. The Sub-Court set aside the mortgages against which order the present appeal was filed.

Held, that under S. 3 of the Act and the notification issued by the Local Government under the said section, the transfer of the applications to the Sub-Court within whose local limits the insolvency did not occur, was *ultra vires* and therefore the proceedings should be set aside. The Sub-Court had jurisdiction in insolvency concurrent with the District Court only within its local limits.

45 M. L. J. 689 followed.

K. Bashyam Aiyangar and *T. R. Srinivasan* for Appellant.

S. Annamalai for Respondent.

K. C.

Varadachariar and King, JJ. Appeal No. 132 of 1931.
6th January, 1937.

Hindu Law—Joint family—Property claimed by one member as his—Onus—Presumptions—Statements in a will regarding (1) nature of and (2) facts as to mode of acquisitions of, properties—How far admissible—Evidence Act, S. 32 (7).

The statement in Mulla's Hindu Law (S. 233) to the effect that where it is proved or admitted as to a Hindu family that it possesses joint property, the presumption of law is that all the property of which it is possessed is joint and that if any member claims any portion of the property as his separate property, the burden lies upon him to show that it was acquired by him in circumstances which would constitute it his separate property is rather broadly stated. As pointed out in A.I.R. 1930 Mad 662 a party alleging that property held by an individual member of a joint family is family property must show that the family was possessed of some property with the aid of which the property in question could have been acquired. Only after this is shown the onus shifts to the party alleging self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate.

1930 M.W.N. 1016, referred to.
I.L.R. 32 Bom. 492, explained.

Statements of relevant facts and contained in documents relating to transactions mentioned in S. 13, cl. (*a*) of the Evidence Act are admissible under S. 32 (7). Statements of fact in a will of a co-parcener regarding the properties stating how he has acquired the properties, etc, are admissible, though as a statement of opinion that they are his self-acquisitions, it may not be. Anyway where they are self-serving, they will have to be scrutinised.

1930 M.W.N. 1016, followed.

I.L.R. 27 Mad 228, doubted.

1921 M.W.N. 560, referred to.

I.L.R. 54 Mad. 576; 61 M.L.J. 887; 10 Beng.L.R. 263 and 15 L.W. 404, distinguished.

W. Kothandaramiah for Appellant.

P. Satyanarayana Rao for Respondent.

S.V.V.

Varadachariar and King, JJ. A. S. Nos. 90 and 165 of 1935.
6th January, 1937.

Indian Contract Act (IX of 1872)—Lunatic—Contract by—Void and not voidable—Difference between Indian and English Laws—Onus of proving incapacity.

Under the Indian Law, a contract with a person of unsound mind is void and not voidable. The language of S. 10 must be given the same meaning, as in the case of minority, even in respect of the requirement of sound mind in S. 11, as part of the theory of 'competency to contract'. If a transaction is entered into by a person who cannot be said to be of 'sound mind' within the definition of S. 12, the effect of S. 10 would be to make the contract void and not merely voidable. The test enunciated in S. 12 must be applied in the light of the nature of the transaction in question and the circumstances attending it. In India the rule is absolute and therefore it is not necessary that the other party must have known of this incapacity. Onus lies on those who plead incapacity to prove that the contracting party was incapable of understanding the nature of the suit transactions or of forming a rational judgment as to their effect upon his interests.

B. Somayya and *P. Chandra Reddi* for Appellant.

V. S. Narasimhachar for Respondent.

S.V.V.

Venkataramana Rao, J. C. R. P. No. 959 of 1936.
7th January, 1937.

Madras Hindu Religious Endowments Act, Ss. 62 and 63—Application to Board to settle a scheme—Board rejecting application—If a suit can be filed questioning that order of the Board.

Where under S. 62 of the Hindu Religious Endowments Act a petition was put in by some of the residents of the place for the settlement of a scheme for the temple in that place alleging mismanagement on the part of the trustees and the Board came to the conclusion that no case has been made out for the framing of a scheme and rejected the petition, no suit can be filed under S. 63 (4) to set aside that order and for framing of a scheme.

An order of the Board rejecting a petition to frame a scheme is not an order within S. 63. Previous to the passing of this Act, when the Advocate-General declined to grant sanction under S. 92, Civil Procedure Code, there was no power in the Court to interfere with it. There was no alteration in the law intended when the consent of the Board was substituted for that of the Advocate-General. Just as refusal by the Advocate-General was not final and it was open to *him* to alter his decision and subsequently sanction the filing of a suit, so also it would be open to the Board to revise their decision and later come to the conclusion that a scheme is necessary. But no suit will lie in a Civil Court to question their decision.

B. Sitarama Rao and *K. E. Rajagopalachari* for Petitioner.

K. V. Sesha Aiyangar for Respondent.

S.V.V.

Mockett and Horwill, JJ. Crl. Ref. No. 9 of 1936.
8th January, 1937.

Criminal Law—Evidence Act, S. 144—Dacoity—Evidence that accused revealed to the police facts leading to the discovery of stolen goods—Court should put specific questions to accused touching those facts for explanation.

Six respondents were convicted of dacoity. The most important evidence against them was that they were said to have revealed to the police the articles alleged to have been stolen in the dacoity. The specific facts alleged with regard to the recovery of the alleged stolen goods were not specifically put to any of the accused. Simply the question was asked 'what have you to say about the evidence'.

Held, that that question is not enough and retrial must be ordered. It is essential that, when matters are present in the case for prosecution from which adverse inference can be drawn against the accused, the accused should be given an opportunity of

explaining those circumstances, by drawing his pointed attention to those circumstances and calling for his explanation.

I.L.R. 59 Mad. 622, followed.

K. Venkataraghavachariar for *The Public Prosecutor* for the Crown.

S.V.V.

The Chief Justice. C. R. P. No. 1509 of 1935.
20th January, 1937.

Provincial Insolvency Act (V of 1920)—Suit on pronote—Debt included in the schedule by debtor but not formally proved—If sufficient proof under S. 78, cl. (2) proviso.

A creditor filed a suit on a pronote dated 4th November, 1928 and the plaint was presented on 20th April, 1934. The defendant was adjudicated insolvent on 5th September, 1930 in a debtor's petition. The adjudication was annulled on 31st August, 1932. Along with the Insolvency Petition, a schedule was filed by the debtor as required by S. 13, cl. (*d*) of Provincial Insolvency Act of his debts with the names of the creditors in which the suit debt was included. Under S. 78 of the Act, cl. 2 proviso, the period between the date of adjudication and annulment should be excluded only if the debt was proved *under the Act.* S. 49 of the Act prescribes the mode of proof of a debt by a creditor by the delivering of an affidavit verifying the debt—compare R. 8 of the Provincial Insolvency Rules.

Held, that the admission of the debt by the insolvent debtor in the schedule filed by him along with the Insolvency Petition is not proof of the debt under S. 49 of the Provincial Insolvency Act, and that the period between 5th September, 1930 and 31st August, 1932, cannot be excluded in computing the time and the suit was therefore barred. The principle laid down in I.L.R. 57 Mad. 767: 67 M.L.J. 45 that proof in insolvency means the formal lodging of the claim as required by the Act—applied.

G. Chandrasekhara Sastri for Petitioner.

V. Viswanatha Sastri for Respondent.

S.V.V.

Mockett and Horwill, JJ. C. R. P. No. 1413 of 1935.
20th January, 1937.

Court-Fees Act (1870), S. 7 (iv) (c) and (v)—Applicability—Suit for declaration of title and possession—Court-fee payable.

"*A*" was adjudicated an insolvent and in the course of administration of his estate, the Official Receiver sold a house as belonging to the insolvent and it was purchased by "*B*", who also took possession thereof through Court. "*C*" the wife of "*A*" put in an application to the Insolvency Court for re-delivery of the

house to her on the ground that it belonged to her and on the rejection of her application, she filed a suit against "*B*" for a declaration of her title to the house and for delivery of possession. The question of court-fee payable in respect of such a suit having been raised,

Held, that the consequential relief, namely, possession, having been specifically provided for under S. 7 (*v*), court-fee should be paid on the valuation of the property computed under S. 7 (*v*) and that S. 7 (*iv*) (*c*) was not applicable to such a case.

I.L.R. 27 Mad. 480; I.L.R. 38 Mad. 922 (F.B.); 68 M.L.J. 755; 70 M.L.J. 398 and C.R.P. Nos. 403 and 404 of 1936, referred to and relied on.

29 L.W. 760; 61 M.L.J. 39; I.L.R. 56 Mad. 314 and 36 L.W. 794, referred to.

R. Desikan for Petitioner.

N. Srinivasa Aiyangar for *The Government Pleader* (*K. S. Krishnaswami Aiyangar*) on behalf of Government.

B.V.V.

Venkatasubba Rao and Venkataramana Rao, JJ.
25th January, 1937.

S. R. No. 12284 of 1935.

Court-Fees Act (*VII of 1870*)—*Suit for arrears of rent under S. 112, Estates Land Act—Court-fee payable*—Ad valorem *and not under Art. 173.*

In a suit filed under S. 112 of the Madras Estates Land Act the court-fee payable is *ad valorem* on the basis of the annual rent the recovery of which is resisted. What the tenant contests is the landholder's right to sell for the arrears claimed and if he succeeds his opponent's right to proceed with the intended sale comes to an end for the time being—on what particular ground the tenant makes good his contention being for this purpose, a matter of no consequence. This is analogous to a suit under S. 95 of the Estates Land Act.

I.L.R. 52 Mad. 972, not approved.

13 C.W.N. 815, relied on.

B. Somayya and *N. C. Vijiaraghavachari* for Appellants.

N. Srinivasa Aiyangar for Government Pleader.

S.V.V.

Mockett and Horwill, JJ.
25th January, 1937.

C. M. S. A. No. 146 of 1933.

Civil Procedure Code (*V of 1908*), *S. 47—Suit against* A *as major—Decree as major—Objection to execution—Executing Court if can enquire into the question of minority.*

The decree-holder respondent obtained a decree against the father of the appellant and the appellant. He impleaded the appellant as a major. In execution the third defendant obstructed and a petition was put in by the decree-holder to have his obstruction removed and possession of the property delivered. The appellant then appeared by his mother as guardian and pleaded that he was a minor. An enquiry was held and he was found to be a minor.

Held, that it is not open to the executing Court to go into the question whether the appellant was a minor or not. S. 47, Civil Procedure Code, is not to be used for the purpose of investigating matters relating to the validity of the decree itself when on the face of it there is nothing illegal about the decree. Exceptions have been recognised when unexecutability is obvious from a perusal of the decree or when a decree has been passed against a dead person and his legal representative is sought to be proceeded against in execution.

I.L.R. 31 All. 572, referred to.

A. I. R. 1928 Mad. 1057; 61 M.L.J. 520; 68 M.L.J. 318, followed and I.L.R. 9 Rang. 480, not followed.

S. R. Muthuswamy Aiyar for Appellant.

M. S. Venkatarama Aiyar for Respondent.

S.V.V.

Mockett and Horwill, JJ. C. R. P. No. 210 of 1935.
26th January, 1937.

Practice and procedure—Suit by wife as next friend of alleged lunatic husband—Husband found not a lunatic—Amendment of plaint—If permissible.

A wife filed a suit on a pronote as next friend of her husband alleging that he was a lunatic. The objection was taken that he was not a lunatic and the Court found that he was not of unsound mind and granted leave to amend the plaint as filed by the plaintiff.

Held, that though ordinarily a suit by another person wrongly alleging that a real plaintiff is a minor or lunatic may be bad, yet it may be upheld where the next friend is authorised by the plaintiff to sue. The probabilities are that this plaintiff while not being insane, was something of an invalid and that his wife would not have filed the suit if she was not his agent. At any rate in the circumstances it is not a matter for interference in revision.

I.L.R. 28 Mad. 396, relied on.

A.I.R. 1936 Rang. 131 and A.I.R. 1935 Cal. 224, distinguished.

S. V. V.

The Chief Justice. C. R. P. No. 1283 of 1935.
11th January, 1937.

Contract—Specific number of articles ordered—Larger number delivered—Not proper performance—Sale of Goods Act, S. 37(2).

Where a specified number of articles is ordered under a contract of sale and a larger number is delivered, the consignee or buyer is entitled to reject the whole under S. 37 (2) of the Sale of Goods Act (III of 1930) as such delivery is not in performance of the contract to deliver the actual number ordered and further more is a proposal of a new contract which is not accepted.

D. Narasa Raju for Petitioner.

P. Satyanarayana Rao for Respondent.

S.V.V.

The Chief Justice. C. R. P. No. 1464 of 1935.
19th January, 1937.

Civil Procedure Code, O. 33, r. 7—Defendant if can show by evidence that there is no cause of action.

A defendant is not entitled at the stage of enquiry provided for by O. 33, r. 7, Civil Procedure Code, to put in evidence showing that there is no cause of action, in addition to that evidence which he is entitled to call on the question of *pauperism.*

I.L.R. 10 Rang. 357, followed.

The Court ought not to go into complicated questions of law or fact at that stage but when there is no complicated question and the plaint has merely disguised by apt words to get over a plea of *res judicata,* it is open to the Court to dismiss the petition when the defendant points it out.

K. V. Sesha Aiyangar for Petitioner.

A. Viswanatha Aiyar and *O. V. Baluswami* for Respondent.

S.V.V.

Venkataramana Rao, J. C. R. P. No. 906 of 1934.
22nd January, 1937.

Provincial Insolvency Act, S. 20—Interim Receiver—Order of appointment specifically authorising him to act under O. 21, r. 89, Civil Procedure Code—Petition by receiver under O. 21, r. 89—Valid.

The second respondent got a decree for money against one *H* and in execution thereof immovable properties of the said *H* were brought to sale on 3rd October, 1932 and purchased by respondents 3 and 4. Subsequent to the sale at the instance of some creditor an application was filed to adjudicate *H* as insolvent and the first respondent was appointed interim receiver under S. 20 and was by that power of appointment ordered to exercise all

powers of an owner under O. 40, r. 1 (*d*), Civil. Procedure Code and was also expressly empowered to act under O. 21, r. 89 to set aside the sale of this property after raising the necessary funds.

Held, that the receiver was entitled to file the petition under O. 21, r. 89 and the petition must be deemed to be filed by the owner for the time being through his agent under O. 21, r. 89.

6 Beng. L.R. 486, referred to.

50 M.L.J. 239, explained.

V. Govindarajachari for Petitioner.

P. Somasundaram, *S. Narayana Rao* and *M. Balachandrudu* for Respondent.

S.V.V.

Varadachariar and King, JJ. Appeal 267 of 1934 and C.M.A.
26th January, 1937. No. 548 of 1934.

Hindu Law—Brothers—Business—Division in status—Continuance of business—Legal relationship between them—Tenants-in-common or partners—Art. 120 applicable—If Art. 106 onus on defendant to prove dissolution before 3 years of suit—Debt of family—Suit on, by manager—Decree in favour of manager—Purchases in manager's name out of those moneys—Belongs to joint family.

The first plaintiff and the first defendant are brothers. The other plaintiffs and the other defendants are their sons and grandsons. Till 1915, the two branches constituted an undivided Hindu family which was possessed of extensive properties. They had also a family business. In 1915, partition between the two branches began and the parties have gone on dividing portions of the properties from time to time. Even at the date of the plaint in 1931, several properties remained undivided. After the division began in 1915, the family trade continued to be carried on till 1922, though it appears that from 1920, the defendants began to do business on their own account as well. After 1922, no further business was carried on in common. Between 1922 and 1931, outstandings due to the family were being collected by the first plaintiff or the first defendant according to convenience. Such collections have sometimes been divided between them as and when they were made but on other occasions the parties seem to have retained in their own hands the amounts respectively collected by them. Hence this suit was filed for partition of properties remaining undivided, and division of outstandings uncollected and an account of collections respectively made by them with a view to direct one party or the other to pay the other's share of excess collected by such party. It was contended for the defendants that after 1915, they must be deemed to be carrying on the business

only as partners and that it was dissolved in 1922, and therefore the suit was barred under Art. 106 of the Limitation Act.

Held, that the suit was not barred by Art. 106. The article applicable is Art. 120. Where all the property belonging to a joint Hindu family has formed the subject of partition, it is reasonable to presume that any further conduct of business by some or all of the members of the original joint family must be the result of a contract between them, and such contract will in law be regarded as one in the nature of a partnership. But where as in the present case, only some properties were divided and other properties belonging to the family including the family trade were not brought into the division at all, the mere fact that even such partial division will in law amount to a division of status will not justify the view that the legal relationship of the members to and in respect of the family business which theretofore rested upon status or birth must thereafter be treated as one resting on contract, so as to involve the notion of a partnership. This suit is really one for a division of property which had not heretofore been divided and the prayer for the taking of the account of the assets including the outstandings due to that business is as reasonably incident to a suit for partition as to a suit for dissolution of partnership. The fact that status became one of tenancy-in-common on division in status does not attach the further result that the status must be held to have so far changed as to give rise to a relationship by contract. The division of status in 1915 only put an end to the right of survivorship between the two branches and involved no other legal consequence.

I.L.R. 4 Lah. 350 and 67 M.L.J. 167, distinguished.

Even if in 1915, they became partners, suit is not barred because the onus is on the defendants to make out that there has been a dissolution more than three years before suit. The mere fact that after a particular date no further business was done will not amount to a dissolution of the partnership.

25 C.W.N. 847; 53 M.L.J. 245; A.I.R. 1930 Lah. 378 and 37 L. W. 288, relied on.

Because the accounts of the period when the debt became due stood in defendant's name as he was then the manager, the defendant filed a suit in his sole name and got a decree. The debt was a debt due to the family. In filing the suit and even after decree, the defendant regarded himself as entitled to that amount for himself and for the plaintiffs. A purchase made in satisfaction of such a claim must in law be regarded as a purchase made by him in his representative character, at any rate in the absence of clear evidence either that he repudiated that character or that the plaintiffs branch repudiated the benefit of the bargain.

26 C.W.N. 406; I.L.R. 37 All. 545; I.L.R. 52 All. 954; A.I.R. 1933 All. 854, relied on.

K. Krishnaswami Aiyangar and *T. S. Narasingha Rao* for Appellants.

B. Sitarama Rao and *K. Srinivasa Rao* for Respondents.

S.V.V.

The Chief Justice. C. R. P. No. 1625 of 1935.
27th January, 1937.

Civil Procedure Code, O. 21, r. 2 and S. 73—Claimant for rateable distributian—Objection that claimant's decree is satisfied raised by a rival decree-holder—No satisfaction of decree entered up—If executing Court can go into question of satisfaction.

The petitioner was the transferee of a decree passed against a defendant and applied in the same Court for rateable distribution in respect of a decree passed in favour of another claimant for rateable distribution in the same Court. There were also other petitioners for rateable distribution and one of them objected to the petitioner's claim on the ground that the decree of which he was the transferee had been satisfied. But there was no record of satisfaction.

Held, that the executing Court cannot entertain such plea and go into evidence of satisfaction, when there is no certificate or record of satisfaction. The fact that the plea is raised not by the judgment-debtor but by a rival decree-holder makes no difference.

P. Satyanarayana Rao for Petitioner.

V. Viyyanna for Respondent.

S.V.V.

Pandrang Row, J. C. M. P. No. 1230 of 1935.
27th January, 1937.

Appeal—Unnumbered application—Returned with endorsement 'I do not see how I have jurisdiction'—If appealable.

A District Judge returned an interlocutory application in insolvency filed before him with the endorsement "Returned. I do not see how I have jurisdiction".

Held, the order is not appealable as it is not the judicial determination of the matter raised in the application. The endorsement is only in the nature of an order giving opportunity to the applicant to state how exactly the Court has jurisdiction and to represent the same with an explanation as to how the District Court has jurisdiction.

N. Appa Rao for Appellant.

A. Gopalacharlu for Respondent.

S.V.V.

The Chief Justice, C. R. P. No. 1489 of 1935.
27th January, 1937.

Insolvency—Exparte *order of adjudication—Properties vested in Official Receiver—Pronote in favour of insolvent—Transfer of, after adjudication—Vacating of* ex parte *order of adjudication—Validates transfer.*

After adjudication, an insolvent transferred a pronote executed in his favour and the transferee filed a suit on it. On objection taken that the transfer was void and the suit was not maintainable by the transferee, the Official Receiver was added as a party to the suit. Later on the order of adjudication, which was made *ex parte,* was set aside on contest, and the insolvency petition was dismissed.

Held, that after an order of adjudication the insolvent has no power to deal with his property which has vested on adjudication in the Official Receiver and therefore the assignment would then be bad. But the effect of the subsequent dismissal of the insolvency petition is to revest the insolvent's property in the transferor as from the date of the order of adjudication, subject however to all acts done by the Official Receiver or under his authority during the continuance of the vesting order being valid. The transfer of the pronote was therefore good and the assignee's suit maintainable.

I.L.R. 20 Mad. 452; I.L.R. 21 Mad. 7 and A.I.R. 1928 Cal. 644, relied on.

A. Gopalacharlu for Petitioner.

Respondent not represented.

S.V.V.

Mockett, J. C. M. S. A. No. 83 of 1934.
28th January, 1937.

C. P. Code, S. 60 (n), T. P. Act, S. 6 (d) and S. 10—Settlement deed for maintenance—Construction—Remedy of creditor.

Where a settlement deed for maintenance ran as follows: "As you are my mother, and as it is my duty to maintain you, I am immediately delivering possession of the immovable property mentioned in paragraph (3) below, under the settlement deed valued at Rs. 1,500 and you are to enjoy the income thereof during your lifetime without rights of gift, sale, etc., and the property will revert back to me or to my heirs", and when a creditor of the maintenance holder attached the properties.

Held, (1) that the restrictions on alienation are not void under S. 10 of the Transfer of Property Act.

I.L.R. 10 Bom. 342 and C.R.P. No. 1617 of 1935, followed.

(2) that in proper cases the creditor may take out equitable execution by getting a receiver appointed.

49 M.L.J. 244 (P.C.), referred to.

K. Krishnamurti for *V. Govindarajachari* for Appellant.

S. Suryaprakasam for Respondents.

S.V.V.

The Chief Justice. C. R. P. No. 1633 of 1935.
28th January, 1937.

Provincial Insolvency Act, S. 44, cl. 1 (b)—" By means of fraud"—Meaning of—Pronote by insolvent without disclosing the fact of petition in insolvency—Discharge in insolvency—Debt not proved as creditor not informed of insolvency—Suit on pronote after discharge—If maintainable.

After the presentation of a petition for adjudication, and before the order of adjudication, the respondent executed a promissory note to the petitioner without disclosing the fact that he had filed the application to be adjudicated. Thereafter the respondent was adjudged insolvent and was finally discharged from Insolvency on his paying one anna in the rupee to his scheduled creditors. The petitioner was not informed of the insolvency proceedings. In a suit on the promissory note, after the order of discharge, the respondent pleaded that by virtue of S. 44 of the Provincial Insolvency Act, he was discharged from the suit claim.

Held, that the respondent incurred the suit debt "by means of fraud" within the meaning of S. 44 (1) (*b*) of the Provincial Insolvency Act and hence he was not discharged from liability. While the mere non-disclosure of the fact that a petition had been filed, may not amount to fraud, still if the conduct of the debtor prior to, at the time of and subsequent to the incurring of the debt showed that he had no intention of repaying the amount, then fraud will be established.

T. R. Srinivasan for Petitioner.

T. R. Venkataraman for Respondent.

S.V.V.

Madhavan Nair and Stodart, JJ. Appeal Nos. 316 and 317 of 1934.
29th January, 1937.

Mortgage—Two mortgages—First mortgagee's suit—Second mortgagee not impleaded—Decree in—Sale in execution—Purchase by a stranger—Possession taken in execution by—Suit by purchaser on first mortgage—Suit by second mortgagee on second mortgage—Rights and liabilities of.

There were two mortgages over a property created one after another, both being simple. The first mortgagee filed a suit on the mortgage in his favour but without impleading the second mortgagee and obtained a decree. In execution thereof the property was purchased by a stranger who took possession from the mortgagor in execution. Later on the purchaser filed a suit for sale on the first mortgage of which he claimed to be the assignee impleading the second mortgagee as a party thereto. The second mortgagee filed another suit for sale on his mortgage impleading the first mortgagee purchaser as a defendant. Both the suits were tried together.

Held, the purchaser was entitled to the principal and interest on the first mortgage according to the tenour of that mortgage but he was bound to bring into account as against the principal and interest the entire profits of the property obtained by him since the date he took possession.

I.L.R. 41 Mad. 513 (except as to certain observations), A.I.R. 1935 All. 692 and I.L.R. 49 Cal. 626, followed.

68 M.L.J. 717, distinguished.

T. M. Krishnaswami Aiyar and *N. Sivaramakrishna Aiyar* for Appellants.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Respondent.

S.V.V.

Varadachariar and King, JJ. A. S. Nos. 60 and 61 of 1934.

1st February, 1937.

Hindu Law—Drawing of money on his account from joint family property—Business run by it—Business, if a joint concern—Father—Alienation by—Not for necessity but beneficial to family—If valid.

Where in pursuance of an arrangement permitting one or other of the coparceners drawing particular sums of money from the joint family account treating it as a debit against himself, a coparcener draws a certain amount from the family and starts a business with it, then that business will thereafter be his own and no longer partake of a joint character.

(1937) 1 M.L.J. 100, relied on.

A father who is in possession of joint family property may alienate a portion thereof not merely for necessity but as a prudent and beneficial measure in the best interests of the family. A father is not on a footing similar to that of a trustee or a widow or the guardian of a minor, though he is placed on a similar footing in some earlier cases. But recent cases are in favour of the view that the father's power is not so circumscribed.

A.I.R. 1933 All. 568, A.I.R. 1935 All. 299, A. S. No. 418 of 1931 and A.I.R. 1927 Mad. 649, relied on.

The analogy of a trustee or a widow or the manager of a minor is not wholly apposite because none of them could claim to have owned the property in absolute right whereas the father in a joint Hindu family must he held to have owned the property absolutely before his sons were born. As under the Mitakshara law the coparcenery right of the sons will not prevail against the liability of the joint family to pay the father's just debts, therefore the father's disability in respect of alienation must likewise be limited only to the limit indicated in the texts themselves and not by any analogy derived from the law of trusts or of guardianship or even from the general law relating to joint tenants.

S. Ramaswami Aiyar and *V. K. Srinivasa Aiyangar* for Appellants.

K. S. Sankara Aiyar and *P.J. Kuppanna Rao* for Respondents.

S.V.V.

Varadachariar and King, JJ. C. R. P. No. 1097 of 1935.

5th February, 1937.

Provincial Insolvency Act (V of 1920), Ss. 28 (7) and 34 (2)—Claim in time on date of Insolvency petition—Claim barred on date of adjudication—If claim provable in insolvency—"When he is adjudged an insolvent" S. 34 (2)—Meaning of.

A debt which was subsisting and could have been enforced in a court of law on the date of the *presentation* of the insolvency petition but claim to which debt was barred by limitation before the date of the order of adjudication and therefore could not be enforced in a Civil Court, is yet a debt which can be proved in insolvency and admitted by the Official Receiver. In view of the provision in S. 28, cl. (7) as to relation back, the criterion date to determine as to "when he is adjudged an insolvent" within the meaning of S. 34 (2) is the date of the filing of the petition.

I.L.R. 14 Lah. 730; A.I.R. 1936 Bom. 130, followed.

35 M.L.J. 296; I.L.R. 50 M. 300; I.L.R. 58 M. 1032, relied on.

Were the matter *res integra,* their Lordships felt that the other view was more correct but as it is a question of practice, their Lordships accepted the current of decisions leaving it to the legislature to alter it if necessary.

T. Krishnaswami Iyengar and *S. K. Narasimhachari* for Petitioner.

N. Rajagopala Iyengar and *S. Tyagarajan* for Respondent.

S.V.V.

Varadachariar and King, JJ. A. S. No. 219 of 1933.
5th February, 1937.

*Hindu Law—Father—New business—Mortgage of family property for that business—Not binding—Loans raised first and subsequent mortgage or sale for the same—Subsequent sales in favour of original creditor—If binding on family—*Bona fide *alienation by father, but portion of consideration not proved to be for necessity —Effect of.*

Where a father started a new business and for that purpose executed mortgages or sales of his family properties, the mortgages or sales will not bind the family. But if in connection with that business he had already borrowed and then executed a sale or mortgage of the family property for the discharge of the liabilities so incurred then that sale or mortgage will be valid by reason of the pious obligation of the son to pay the debt. For this purpose it would make no difference that the earlier mortgages were in favour of the subsequent vendee himself. (I.L.R. 15 All. 75.) The fact of the mortgage and the sale being in favour of the same person will be material in considering the point emphasised in I.L.R. 46 All. 95, namely, whether the loan is really antecedent to the subsequent alienation.

The result of authorities is that if a sale by a father or coparcener was a *bona fide* transaction and in fact necessary, the circumstance that a smaller or greater portion of the sale proceeds has been applied for purposes not binding upon the joint family will not of itself invalidate the sale. I.L.R. 58 Mad. 350 cannot be read as laying down that where there has been a sale for a larger amount than was required to meet antecedent debts or other necessity the sale must be set aside.

I.L.R. 27 Cal. 865, followed.

Y. Suryanarayana for Appellant.

B. Jagannadha Doss for Respondent.

S.V.V.

The Chief Justice and C. R. P. No. 1192 of 1934.
Venkataramana Rao, J.
8th February, 1937.

Practice—Civil Rules of Practice—Rules inconsistent with Civil Procedure Code of 1908—If valid.

As their Lordships felt that I.L.R. 37 Mad. 17 may require reconsideration and the question is one of public importance, the following question has been referred to a Full Bench.

"Are rules in the Civil Rules of practice made under the Code of 1882 but not re-enacted and published in accordance with the

procedure prescribed in part 10 of the Civil Procedure Code of 1908 and inconsistent with any of the rules of the first schedule of the latter valid and have they any legal effect".

C. S. Swaminathan for Petitioner.

V. C. Viraraghavachariar for Respondent.

S.V.V.

Varadachariar and Pandrang Row, JJ. A. S. No. 171 of 1934.
11th February, 1937.

Hindu Law—Widow—Succession of, to her co-widow—Nature of estate taken—Reversioner—Nature of proof that he is the nearest reversioner—If necessary to prove that there are no nearer heirs.

A co-widow who succeeds as heir to the stridhanam property of a co-widow would take only a limited interest.

I.L.R. 25 All. 476 and I.L.R. 49 Mad. 152, relied on.

The rule that a person claiming as a reversioner should prove not merely that he is an heir but that he is the nearest heir does not mean that the plaintiff must exclude the possibility of there being nearer heirs in existence. It is only if on the evidence there is room for doubt as to the plaintiff being the nearest heir, the principle comes in that the Court must insist on strict proof that he is the nearest heir. The plaintiff is not expected to prove an absolute negative, in the sense of excluding the possibility of the existence of some unknown person who if he had existed might be a nearer heir.

N. Gopala Menon and *V. Ramaswami Mudaliar* for Appellants.

A. V. Viswanatha Sastri and *C. Santhamurthi Naidu* for Respondents.

S.V.V.

Varadachariar and Pandrang Row, JJ. A. S. No. 264 of 1935.
11th February, 1937.

Transfer of Property Act, Ss. 54, 55, cl. (5) and cl. (6)—Contract to sell containing various other covenants—If one of sale—Consideration payment of decrees which were adjusted by that contract—If decree amounts prepaid purchase money—Default of purchaser to carry out other terms—If disentitles him from claiming the lien under S. 55, cl. (6).

The plaintiff obtained a mortgage decree against *V* and another mortgage decree (O. S. No. 25) against *V's* brother *R*. He brought the properties to sale in O. S. No. 25 and realised all but Rs. 1,750 due to him under that decree and for the balance got a personal decree against *R* and he himself purchased some properties in execution of that decree. In execution of O.S. No. 24 he

brought the mortgaged properties to sale. One *M* purchased them in execution in October, 1926 and deposited 25 per cent. of purchase money into Court. In November, *V* and *M* executed an agreement to plaintiff which provided (1) that *V* and *M* should convey certain properties to the plaintiff in satisfaction of his claims under the two decrees; (2) that the plaintiff is to sell certain lands to *V* on payment of Rs. 952 odd; (3) that in consideration of *V* having brought about the settlement the plaintiff should give up certain properties in favour of *V* or pay him Rs. 1,000 on registration, etc. In pursuance of this *V* and *R* applied for entering up of satisfaction of the decrees in O. S. Nos. 24 and 25 and *M* for withdrawing the 25 per cent. purchase money deposited by him and the High Court in 1932 ordered that the parties' rights should be worked out on foot of that agreement and ordered the petitions. Thereupon in 1933 the plaintiff filed this suit claiming two reliefs in the alternative for specific performance of the contract of sale in cl. (1) *supra,* or for recovery of the decree amounts due as pre-paid purchase money. It was held by the lower Court that the claim for specific performance was barred as it was more than three years from the date fixed for performance of the contract, *i.e.*, November, 1926, that the portion of the consideration representing what was due to the plaintiff by *R* in O. S. No. 25 could not be allowed in this suit and decreed the sum due under the decree in O. S. No. 24 by *V*, giving a charge for the same on the suit properties. On appeal by *V's* representatives,

Held, that the first part of the transaction evidenced by the agreement is one of sale and the mere fact that there are other provisions giving *V* certain rights against the plaintiff as consideration for bringing about the settlement or having included in the settlement his brother *R's* debt as well does not detract from the true character of the transaction in the first clause. The mere fact that in the contract there are various covenants will not change the character of the transaction if in substance it was one of sale.

I.L.R. 59 Mad. 910, applied.

The terms of the agreement clearly make the decree amount the consideration for the sale and hence they are 'price' within the meaning of S. 54 of the Transfer of Property Act being amounts already due to plaintiff from the parties to the agreement. The result is that the decree amount changes its legal character as a result of the agreement and becomes purchase money in the hands of the vendors. The case is therefore one of pre-paid purchase money.

I.L.R. 11 All. 47, relied on.

Assuming that the plaintiff has not fulfilled the other terms in the agreement that will not exclude the application of S. 55, cl. (6)

of the Transfer of Property Act as the lien given by that section can only be excluded by a contract to the contrary.

I.L.R. 31 Cal. 57, followed.

P. V. Rajamannar and *K. Subba Rao* for Appellants.

P. Satyanarayana Rao for Respondents.

S.V.V.

The Chief Justice and Venkataramana Rao, J. C. R. P. No. 1295 of 1935 and C. R. P. No. 1167 of 1936.

11th February, 1937.

Provincial Insolvency Act (1920), Ss. 28 (2) and 29—Othidar in a prior suit losing possession of properties mortgaged—Insolvency of othidar and othi right sold to respondent—Respondent filing a suit against the petitioner, the executant of the othi in favour of othidar—Insolvency of petitioner—Plea of defence that suit was bad as leave of Court was not obtained—When leave necessary —Application of S. 29.

The petitioner executed an othi deed on 11th March, 1924. In execution of a decree on a prior mortgage the othidar lost possession of the properties. The othidar thereafter became insolvent and the othi rights were sold to the respondent who filed a suit against the petitioner. Prior to the suit the petitioner was adjudicated insolvent and no leave of the Insolvency Court was obtained before the suit was filed. The petitioner pleaded in defence that the suit was bad without such leave under S. 28 (2) of the Provincial Insolvency Act. The lower Court however decreed the suit holding that S. 29 of the Provincial Insolvency Act enabled it to permit the continuance of the suit.

Held, that if subsequent to adjudication a suit was laid against the insolvent for a provable debt, then leave of the Insolvency Court was a condition precedent under S. 28 (2) of the Provincial Insolvency Act. S. 29 applied only to cases, where pending proceedings against a person, he was adjudicated insolvent.

I.L.R. 51 Mad. 833, I.L.R. 40 Bom. 235, 34 Bom.L.R. 649, I.L.R. 8 Lah. 593, I.L.R. 2 Rang. 643, applied.

A.I.R. 1929 Mad. 480, Observations of Odger's J. in I.L.R. 51 Mad. 833, treated as *obiter.*

I.L.R. 41 Bom. 812, dissented from.

31 Bom. L.R. 981, I.L.R. 57 Bom. 623, 58 L. T. 85, not followed.

2 Hals. 90, Williams on Bankruptcy, 14th Edn., p. 70, 36 Ch. D. 138 at 143, (1896) 1 Ch. 939 at 946, referred to.

S. 28 (2) applied even to cases where the suit is filed in ignorance of the insolvency proceedings.

56 M.L.J. 493, dissented from.

T. R. Srinivasan and *R. Visvanathan* for Petitioner.

S. K. Ahmed Meeran for Respondent.

K.C.

The Chief Justice. C. R. P. No. 1652 of 1935.
15th February, 1937.

Limitation Act (IX of 1908), S. 21 (3) (b)—Eldest of three brothers executing a promissory note—Subsequent partition among the brothers—Part payments towards interest by executant of the note after partition—Whether part payments made after partition would save limitation regarding the divided brothers.

Where a promissory note dated 16th July, 1928, was executed by the eldest member of a family consisting of three brothers and a suit on it was filed on 22nd October, 1934, but in order to save limitation two part payments towards interest of 10th September, 1930 and 25th December, 1931, were relied on though they were made after partition among the brothers, on the question whether the part payments by the executant of the note in the circumstances would save bar of limitation in regard to the other two divided brothers.

Held, that dealing with the case on the assumption that the eldest brother executed the note as a family manager on behalf of the family and for purposes binding on all the members, the payments towards interest after partition were not made by the manager for the time being as required by S. 21 (3) (*b*) of the Limitation Act and therefore did not save limitation with regard to the divided brothers.

Judgment of Curgenven, J., in C.R.P. No. 623 of 1933, followed.

I.L.R. 56 Mad. 833, distinguished.

S. 21 (3) is an amendment inserted by Act I of 1927 and the effect of sub-clause (*b*) of that sub-section is that after partition there is no undivided family and therefore no managing member to it, and unless there is authority to acknowledge debt or make part payment, other members will not be bound by the acknowledgment or part payment by one member alone.

C. K. Visvanatha Aiyar for Petitioner.

M. Ranganatha Sastri amicus curiæ.

K.C.

Venkatasubba Rao and Cornish, JJ. A. S. No. 71 of 1935.
16th February, 1937.

Minor—Decree passed against—Guardian ad litem *not prosecuting a defence raised—Suit by minor to set aside the decree—Fact of non-prosecution of defence raised, if itself sufficient to constitute negligence, when no point in the defence raised.*

A mortgage decree was obtained against a father and his undivided minor sons who were represented by their mother. Having put forth a defence, the mother failed to prosecute the

defence and allowed the suit to proceed *ex parte*. In a suit filed by the minor for a declaration that the decree passed against him is not valid and binding on him on the grounds of collusion and negligence on the part of the guardian,

Held, that it is the duty of the plaintiff to prove the collusion and negligence set up by him and that the burden is not discharged by merely alleging that the guardian *ad litem* having put forth a defence did not appear to substantiate it. There is no difference between a guardian failing to raise a defence and abandoning a defence which has been raised. The plaintiff must show that he had an available defence which if substantiated in the previous suit would have led to a different result. It is clear from the facts that the debt for the discharge of which the mortgage was effected had become antecedent in fact as well as in time. So the mother raised a defence which ought never to have been put forward and the abandoning of such a defence will not amount to gross negligence on the part of the guardian.

14 M.I.A. 393 and 6 C.L.J. 448, followed.

I.L.R. 45 Mad. 425, referred to.

B. Somayya and *M. Krishna Rao* for Appellants.

P. Somasundaram for Respondent.

S.V.V.

Varadachariar and Pandrang Row, JJ. A. S. No. 426 of 1935.
17th February, 1937.

Mortgage—Mortgage over 75 items—Later mortgage over the 75 plus *4 other items—Part of consideration paid to discharge a still earlier mortgage—Suit by second mortgagee—Denial of third mortgagee's claim to priority—Costs of suit—If second mortgagee can have his full costs first—O. 34, r. 14, Civil Procedure Code—Appendix D, Form 10—Sale proceeds of items 76-79—Solely belongs to third mortgagee—Not to be set off against the amount entitled to priority.*

The rule that when one person sues for the benefit of himself and other persons, some of whom may be defendants, the costs incurred by the plaintiff must first be provided for out of the sums realised in execution and the balance alone distributed among the several claimants does not apply to a case where a puisne mortgagee sues on his mortgage impleading a later mortgagee but denying the claim to priority pleaded by the later mortgagee to the extent of the consideration that went to discharge an earlier mortgage, which claim was upheld. The manner in which the plaintiff is entitled to claim satisfaction as regards his costs can only be regulated by O. 34, r. 13 and Form No. 10 of Appendix D of the Civil Procedure Code, that is, he can pay himself the costs

only out of such portion of the sale proceeds as remains after satisfying the claim of the puisne mortgagee to the extent of the priority allowed to him.

Where the second mortgage for Rs. 5,500 was over 75 items and the third for Rs. 10,000 over those 75 *plus* 4 other items, and a priority was given to the third to the extent of about Rs. 6,500 which went to discharge a first mortgage, the third mortgagee is entitled wholly to the sale proceeds of the additional 4 items comprised in his mortgage and it cannot be directed to go in reduction of the Rs. 6,500 for which he is entitled to priority. The plaintiff (second mortgagee) is not entitled to claim any right by way of marshalling as regards the sale of those items.

B. Sitarama Rao and *Parakat Govinda Menon* for Appellant.

K. P. Ramakrishna Aiyar for Respondent.

S.V.V.

Varadachariar and Pandrang Row, JJ. Appeal No. 174 of 1927.
18th February, 1937.

Limitation—Suit for partition—Prior suit for—Award—Decree on—Plaintiff's father party to prior suit—Later suit to which plaintiff party—Decision that award was inoperative—Res judicata—*If plaintiff should seek to set aside award.*

In a suit for partition of joint family property it was pleaded in defence that the suit was barred by limitation so far as it claimed a general partition because the rights of the various branches of the family had been settled by a previous award to which the plaintiff's father was a party and which had been made a rule of Court and the plaintiff who was bound by the decree to which his father was a party had not filed a suit to set aside that decree within three years after he attained majority. It was however found that in a prior suit for partition by another member of the family in which all the members of the family including the present plaintiff were parties, the Court had decided that the award was inoperative and that this decision was *res judicata* between the parties.

Held, that in the circumstances it was unnecessary for the present plaintiff to take independent steps to have the award or the decree based thereon set aside and that his omission to do so in time was not a bar to his obtaining relief by way of partition ignoring the award and the decree based thereon.

S. R. Muthuswami Aiyar for Appellant.

K. Rajah Aiyar, R. Ramasubba Aiyar and *R. Sundaralingam* for Respondents.

S.V.V.

Horwill, J. C. M. S. A. No. 132 of 1934
26th February, 1937. and C. R. P. No. 306 of 1933.

Civil Procedure Code (V of 1908), S. 47 and O. 21, r. 93—Order under—Appealability—Application for refund—Article of limitation applicable—Starting point.

An auction sale was set aside on an application under O. 21, r. 90 at the instance of the judgment-debtor, on 17th December, 1923. Appeals, Second Appeals and Letters Patent Appeals were preferred by the decree-holder as well as the auction-purchaser, and the High Court finally confirmed the order setting aside the sale on 13th September, 1929. An application for refund under O. 21, r. 93 was filed by the auction-purchaser on 29th August, 1932, within three years from the date of the disposal of the Letters Patent Appeals by the High Court. The trial Court directed refund, holding that Art. 181 applied and that limitation ran from the date of the High Court decree. On appeal, the Subordinate Judge held that an appeal to him was competent under S. 47, Civil Procedure Code, and that under Art. 181 the application was barred as the starting point was the date of the first Court's order setting aside the sale.

Held, (1) an order under O. 21, r. 93, Civil Procedure Code, fell within the purview of S. 47 and is a matter arising between the parties or their representatives and relates to the execution, discharge or satisfaction of the decree and hence an appeal to the Subordinate Judge's Court was competent and a second appeal to the High Court lay.

3 L.W. 105; I.L.R. 9 Mad. 437 and I.L.R. 12 All. 397, not followed.

43 M.L.J. 253 and I.L.R. 45 All. 369, relied on.

(2) An application for refund under O. 21, r. 93 is not an application for execution and Art. 182 is therefore inapplicable.

I.L.R. 40 Mad. 780; 1931 M.W.N. 1006; I.L.R. 6 Pat. 24 (P.C.) and I.L.R. 44 Mad. 714, distinguished.

(3) The proper article of the Limitation Act applicable is Art. 181 and time runs from the date of the order setting aside the sale.

I.L.R. 11 All. 372, not followed.

I.L.R. 7 Pat. 794, distinguished.

I.L.R. 46 Cal. 670 (P.C.); I.L.R. 57 All. 26 (F.B.); A.I.R. 1933 Cal. 422; I.L.R. 28 Cal. 113 and 16 L.W. 285, relied on.

S. Venkataraman for *K. V. Krishnaswami Aiyar* and *G. Gopalaswami* for Appellant.

K. S. Sankara Aiyar for Respondent.

S.V.V.

Varadachariar and Pandrang Row, JJ. Appeal Nos. 160 of 1931,
19th February, 1937. 100 and 101 of 1934, 40 of
1935 and S. A. No. 544 of 1933.

Limitation Act (IX of 1908)—Kavimeras—Payable out of the beriz of the villages—Transfer of villages—If right to Meras personal to Zemindar or runs with the land—Art. 131 if applicable—Periodically recurring right.

Basing on a grant to the plaintiff's ancestor more than 200 years ago by the then Rajah of Karvetnagar, the plaintiff claimed that he has a right to kavimera or poet's perquisites which is deducted from the beriz of the villages and is payable out of the melvaram or rent due to the landlord and claimed a charge on the estate on the ground that it is carved out of the Zemindari. The accounts show that the practice has been for the village officers, in preparing the village accounts, to make a deduction in respect of this kavimera before ascertaining the amounts which they are to remit to the Zemindar as his net income from the village and likewise when mortgaging usufructuarily the estate, the mortgagee was directed to appropriate only the income remaining after deducting this mera. This right was asserted and established in various litigations. It was found that it was in recognition of a hereditary right under a pre-existing but subsequently lost grant that this mera was being paid to plaintiff's predecessors-in-title and afterwards to plaintiff. It was contended that the payments were voluntary and not enforceable in law, that they could at best be regarded only as enuring so long as the poet's services were rendered and as they were not now rendered, they cannot be claimed hereafter, that it was only a personal liability and did not bind the transferees from the Zemindar, and in any event it cannot be claimed for more than 3 years before suit.

Held, the liability is one *virtute tenurae* and one cast on the person in possession of the melvaram interest to make this disbursement before he can appropriate for his own use the rest of the melvaram income and as long as any person is in possession of the village out of whose income the mera is payable, he is subject to the liability and the liability is not one arising out of his having wrongly made a collection of what he was not entitled to collect but one arising from the fact that out of the collections which as a Zemindar he is entitled to make he is bound to make the disbursements and appropriate only the balance. Only in that sense it is a personal liability. It is not one resting on covenants but in the nature of a charge because the payment is one which has to be made out of the profits of immovable property.

27 M.L.J. 614 and I.L.R. 42 Mad. 581, referred.

N.R.C.

Article applicable is Art. 131 as it is a periodically recurring right.

I.L.R. 38 Mad. 916, followed.

1936 M.W.N. 742 and I.L.R. 58 Mad. 306, referred to.

39 M.L.J. 492 and 57 M.L.J. 160, distinguished.

Quaere if it is also covered by Art. 132 left open.

V. V. Srinivasa Aiyangar, T. K. Srinivasathathachariar, B. C. Seshachala Aiyar and *R. Venkatasubba Rao* for Appellants.

B. Somayya for Respondent.

S.V.V.

Varadachariar and Pandrang Row, JJ. A. S. No. 193 of 1934.
1st March, 1937.

Hindu Law—Sale by father to pay off antecedent debts—Invalid only if the antecedent debt were immoral and vendee was aware of that blemish—Prior suit against father and sons—Sons exonerated—No reasons given—Decree against father—Mortgage by father to pay off that decree debt—Suit on—Effect of exoneration—If sons can claim they are not liable—If exoneration res judicata.

When a father conveys ancestral property to raise money for payment of an antecedent debt, the sons can get their share released from such conveyance only on proof that the antecedent debt was immoral and also that the purchaser was aware that it was so. (I.L.R. 5 C. 148.) Even 15 M.L.T. 372 while making a distinction between a mortgage and a sale holds that, even in the case of a mortgage, if the mortgagee made reasonable enquiries and acted *bona fide*, the validity of the mortgage would not be affected by the impropriety of the original loan.

In a prior suit O. S. No. 30 of 1921 against the father, the sons were first impleaded as defendants but later the pleader for the plaintiff stated that he gave up the sons without giving any reasons. The result was that the sons were treated as having been given up by the plaintiff and a decree was passed only against the father. Later a mortgage was executed by the father, part of the consideration being the decree debt.

Held, no *res judicata* as S. 11 can only be invoked in respect of any order made by the Court. The fact that the plaintiff who, in the first instance, asked for a decree against the joint family property so far as the interests of the minor sons therein are concerned subsequently withdrew his claim against them can only bring the case under O. 23, r. 1, Civil Procedure Code. The result of such a withdrawal is not to bring in the operation of S. 11 but only to entail the statutory penalty enacted in O. 23, r. 1. It cannot be

said that what happened in O. S. No. 30 of 1921 amounted to an adjudication, express or implied, that the sons are not liable in respect of the claim in that suit.

A. V. Narayanaswami Aiyar for Appellant.

S. Ramaswami Aiyar for Respondent.

S.V.V.

Varadachariar and Pandrang Row, JJ. A. S. No. 286 of 1929.
1st March, 1937.

Hindu Law—Widow—Surrender by—Reversioner conveying portion of property not to widow but to a nominee of the widow—Conveyance being consideration for surrender—Surrender invalid.

A transaction will equally be a device to divide the estate and opposed to law whether the lady who makes the surrender directly takes back a portion of the property or a reversioner as consideration for the surrender conveys a portion of the property to a nominee or nominees of the lady surrendering.

I.L.R. 48 Cal. 108, followed.

T. M. Ramaswami Aiyar, K. R. Rama Aiyar and *S. V. Rama Aiyangar* for Appellants.

R. Krishnaswami and *M. R. Rajagopala Aiyar* for Respondents.

S.V.V.

King, J. C. R. P. No. 562 of 1935.
2nd March, 1937.

Negotiable Instruments Act—Evidence Act, S. 91—Partition between uncles and nephew—Partition deed unregistered—Provision in deed for payment of a sum to equalise the shares—Pronote for the same—Suit on—Circumstances attending pronote, if can be proved—Transfer of Property Act, S. 53-A—Not applicable.

In 1930 there was a partition of family properties consisting of movable and immovable property between the minor defendant in the suit and his two paternal uncles. It was evidenced by a deed which was not registered. It was provided in the partition-deed that to equalise the shares, the minor defendant should pay Rs. 700 to one of his uncles and on the same day a pronote was executed by the minor's mother as guardian in favour of the uncle. In the suit on the note by the transferee of the note evidence was given of the circumstances under which the note came to be executed to show that the note was binding on the minors.

Held, that the liability under the note was a term of the partition, that by reason of S. 91 of the Evidence Act no parol evidence was admissible to prove it as the partition deed was unregistered, that the arrangement as to movables was insepara-

ble from that as to immovable property and hence the whole deed was inadmissible and there was no scope for the application of the doctrine of part-performance under S. 53-A of the Transfer of Property Act and the suit was liable to be dismissed.

I.L.R. 55 Mad. 72; A.I.R. 1934 Rang. 303, followed.

V. Viyyanna for Petitioner.

V. Suryanarayana for Respondent.

S.V.V.

The Chief Justice. C. R. P. No. 225 of 1936.
3rd March, 1937.

Hindu Law—Father—Renewal of a pronote after partition with sons—If binding on sons.

A suit was brought on a pronote dated 7th September, 1932, executed by first defendant, father of defendants 3 to 5 in plaintiff's favour in renewal of a pronote dated 30th October, 1929, executed by the first defendant which was again in renewal of a prior note dated 8th December, 1927. There was a partition between first defendant and defendants 3 to 5 on 10th April, 1932. The lower Court gave a decree to plaintiff treating the suit as one on the original cause of action though the note dated 7th September, 1932, was a renewal by father alone after partition.

Held, applying I.L.R. 56 Mad. 833, that renewal was a fresh obligation which the father had no power to incur after partition so as to bind the sons, that the suit could not be treated as one on the debt and even if it could be so treated, it was barred as against the sons and accordingly the suit was dismissed as against the sons.

V. Suryanarayana for Petitioners.

V. Satyanarayana for Respondent.

S.V.V.

The Chief Justice, C. R. P. No. 64 of 1936.
24th February, 1937.

The Madras Village Courts Act (I of 1889), S. 73—Suit in Village Court—Defendant ex parte—*Plea of limitation—Point not argued*—Ex parte *decree by village Court—Petition under S. 73—If District Munsiff can set aside the decree on the ground of limitation.*

A Suit was filed in a village Court. The defendant chose to remain *ex parte* and no argument was urged before the village Court that the suit was barred by limitation. As a result, an *ex parte* decree was passed. In a revision under S. 73 of the Village Courts Act filed by the defendant, the District Munsiff set aside the decree of the village Court holding that the suit was barred by limitation.

Held, that the District Munsiff had no jurisdiction to so set aside the decree. The District Munsiff is then sitting as a Court of revision under S. 73 and not as a Court of appeal. And unless it can come under one or other grounds mentioned in S. 73, the District Munsiff has no jurisdiction to interfere with the decree of village Court. A wrong decision on a point of limitation on no decision at all on the question of limitation when that question was not argued before the village Court, by the complaining party cannot be regarded as making the decree "clearly unjust" within the meaning of S. 73.

K. P. Ramakrishna Aiyar for Petitioner.

A. Gopalacharlu for *P. S. Narayana Aiyar* for Respondent.

S.V.V.

The Chief Justice. C. R. P. No. 315 of 1936.
5th March, 1937.

Madras Village Courts Act (I of 1889), Ss. 13 and 14—Suit for recovery of money on the last day of limitation—Lack of jurisdiction of Panchayat Court—Re-presentation to the proper Court—Time taken whether could be excluded in the calculation of limitation—Circumstances when such time could be excluded.

The plaintiff filed a suit for the recovery of Rs. 136 and odd on the last day of limitation in the Panchayat Court. The defendant did not submit to the jurisdiction of that Court at the trial which commenced on 24th December, 1934 and after some more adjournments the plaint was ultimately returned for re-presentation to the proper Court on 23rd February, 1935. The plaint was re-presented in the Sub-Court on the same day and the plaintiff claimed the exclusion from limitation of the period during which the suit was pending in the Panchayat Court.

N.R.C.

Held, that S. 14 of the Village Courts' Act leaves no alternative and admits of no doubt or ambiguity and that without the written consent of both the parties, the Village Court has no jurisdiction whatever to hear and determine a suit of the value of more than Rs. 50 so that, directly that the defendant refused to give his consent to submit to the jurisdiction of the village Court, the suit would have to be re-presented in the other Court. If instead of presenting the plaint immediately in the Sub-Court he waited till the return order was made and allowed the suit to be adjourned, there is no good faith on the part of the plaintiff and the said period cannot be excluded under S. 14 of the Limitation Act.

K. Kameswara Rao for Petitioner.

M. S. Ramachandra Rao for Respondent

K.C.

[F. B.].

The Chief Justice, Venkataramana Rao and Lakshmana Rao, JJ. C. R. P. No. 113 of 1935.

15th March, 1937.

Civil Procedure Code (V of 1908), O. 33, r. 1 Expl.—Suit in forma pauperis *by the Official Receiver—Whether his possession of sufficient means in his personal capacity could prevent his suing as a pauper.*

On the question whether an Official Receiver, in whom the estate of an insolvent vested by virtue of an order of adjudication, can institute a suit as a pauper for recovery of the said estate,

Held, that the Official Receiver can be allowed to sue as a pauper, provided he fulfils the conditions laid down in the explanation to O. 33, r. 1 of the Civil Procedure Code in respect of the estate on whose behalf he is suing. The fact that in his personal capacity he is possessed of sufficient means or he has other estates in his hands is immaterial.

Case-law reviewed.

A.I.R. 1930 Rang. 259, dissented from.

The word 'person' in O. 33, r. 1, explained.

K. S. Venkatarama Aiyar for Petitioner.

K. V. Krishnaswami Aiyar, C. A. Seshagiri Sastri, R. Kesava Aiyangar and *T. D. Srinivasachariar* for Respondents.

K.C.

[F. B.]

Venkatasubba Rao, Cornish and Venkataramana Rao, JJ. C. M. A. No. 433 of 1936.

3rd March, 1937.

Hindu Law—Suit against father for recovery of properties—Father not expressly *sued as father—Finding that he was sued as representing the family—Joint family properties—Decree against father for mesne profits—Partition after decree by trial Court and pending appeal—Death of father after decree—Son, if can be added as legal representative and execution taken against the properties fallen to the son—Ss. 50 and 53 of the Civil Procedure Code—Effect of.*

A suit was filed in 1919 for recovery of possession of certain immovable properties and for mesne profits against the fifth defendant (the father) and defendants 6 and 7 sons by his first wife. The fifth defendant had then another son, an infant, by the second wife. He was not impleaded. The father was not sued expressly as father or manager but the Court found that the suit related to joint family properties, and that he was sued as representing the family and that it was in that capacity he defended the action. The sixth and seventh defendants were found to have been divided from the father in 1912 itself and therefore they were exonerated from the suit. The first Court passed its decree on 21st December, 1925. An appeal was filed against it to the High Court which passed a decree for possession against the father in May, 1933. In between and pending the appeal there was a partition between the second wife's son and the father on 1st February, 1931, which was found to be genuine and at that partition the suit properties were allotted to the share of the father. The plaintiff obtained possession of the lands in October, 1933. A further judgment for mesne profits was passed on 3rd April, 1935, against the father. The father died in June that year. In February, 1936, the plaintiff filed an execution application praying that the son by the 2nd wife may be added as the father's legal representative and that execution may be permitted against the coparcenary properties in the hands of the son. The son relied on the partition and contended that therefore the creditor cannot proceed against him in execution.

Held, that the coparcenary properties in the hands of the sons could be proceeded against.

Per *Venkatasubba Rao* and *Venkataramana Rao, JJ.*—On the ground that as the suit related to joint family property and the father, accredited head of the family, must be presumed to have been sued, and on the facts was found to have been sued, as representing the family and he defended the action in that capacity, the

N.R.C.

son, though not *eo nomine* on the record, should be treated as though he himself were substantially a party to the suit; and from that it follows that the decree can be executed not only against the parties whose names appear on the decree but also against those who must be deemed to be constructive parties. In this view it is immaterial whether the family continues to remain joint or become divided. The son could not at his will put an end to the representation which had gone on here for nearly 12 years, producing by that act the strange legal result of his not being bound by the decree to be passed thereafter.

L.R. 14 I.A. 187; L.R. 41 I.A. 215; L.R. 54 I.A. 122; L.R. 38 I.A. 45; A.I.R. 1935 Lah. 1 and L.R. 6 I.A. 233, relied on.

I.L.R. 6 Mad. 208 and I.L.R. 10 Mad. 316 must be deemed to be now obsolete.

The question whether a decree passed against a father in respect of a pre-partition personal debt of his, though prior to the partition, cannot be executed subsequent to the partition against the coparcenary property in the hands of the son and the question whether S. 53, Civil Procedure Code, is inapplicable where before the father's death the son had become divided left open.

Per *Cornish, J.*—Also on the ground that S. 53, Civil Procedure Code, applies to the case and whether regarded as a joint family debt or personal debt. S. 53 covers a case where there is a decree against the father in respect of a pre-partition debt binding on the share of property allotted to the son in the partition. In such circumstances for the purposes of S. 50, Civil Procedure Code, the son is to be deemed to be the legal representative of his deceased father in respect of the share taken by the son in the partition.

N. Sivaramakrishna Aiyar for Appellant.

P. Satyanarayana Rao for Respondent.

S. V. V.

Horwill, J. C. M. S. A. No. 8 of 1935.
5th March, 1937.

Hindu Law—Partition prior to suit—Subsequent suit against father alone for a pre-partition debt—Death of father pending suit —Son added as legal representative—Decree against assets of father in the hands of son—Decree-holder if can proceed in execution against son's share.

A suit was brought against a Hindu father alone on a money claim. Pending that suit the father died and his son was brought on record as legal representative and not in his individual capacity. The decree was passed against the *assets* of the father in the hands of the son. There was a partition prior to the suit between the father and the son. In execution of the decree the decree-holder applied for the attachment of properties which fell to the share of the son at the partition.

Held, execution could not proceed against such of the properties as fell to the share of the son at the partition. When a suit is brought against the father as *manager* of the family the decree, although it purports to be against the father, is in reality against the family, and in execution the son's share can also be proceeded against as the son is *virtually* a party to the suit though not *eo nomine* a party. But when the suit is instituted against the father alone after a partition between the father and his son the father can no longer represent the son and therefore the suit is not in a representative capacity. Therefore after partition property of the son is distinct from that of his father and cannot be proceeded against in *execution* for the father's debt without a finding that it is a debt for which the son is liable. Further the father's power of disposal over the son's share ceases on partition.

I.L.R. 22 Mad. 519, referred to; I.L.R. 51 Mad. 361 and 417 and A.I.R. 1934 Mad. 662, followed; C. M. A. No. 433 of 1936: (1937) 1 M.L.J. (N.R.C.) p. 31, referred to and A.I.R. 1929 Mad. 878, distinguished.

Case-law discussed.

Scope of S. 53, Civil Procedure Code, discussed.

K. Srinivasa Rao and *Jayaram* for Appellant.

A. Gopalacharlu for Respondent.

S.V.V.

Varadachariar and Pandrang Row, JJ. A. S. No. 132 of 1935.
17th March, 1937.

Principal and Agent—Power of attorney—Agent having no express power to borrow—Borrowing by—No necessity to borrow —Principal benefited by the loan—Liable to the extent of the

benefit—Contract Act, Ss. 69, 70, 187 and 188—Principal jointly liable with agent.

One *M* was the owner of estate *H* and he bequeathed it to first defendant (his son) and certain others subject to a life interest in favour of third defendant. First defendant was one of the executors under his father's will and he alone took out probate. He appointed second defendant his agent for the management of the estate in 1927. Between 1927 and 1929, the second defendant drew monies from the plaintiff from time to time. According to the plaintiff they were for the management of the estate. Re-payments used to be made by cash or cheque or by supply of tea grown on the estate. In October, 1929, the balance was found to be Rs. 15,000 and it was agreed with the second defendant that this amount should be treated as an advance for the supply of tea from the estate for a period of 3 years. The first defendant was sought to be made liable on two grounds:—(1) that the second defendant acted within the limits of his authority, and (2) that the first defendant and his estate have benefited by the moneys paid by the plaintiff from time to time. It was found that the second defendant had no express authority to borrow and that there was no necessity for borrowing. The principal was away from the country.

Held, that where the agents' authority is defined in writing, S. 187 of the Contract Act cannot be relied on, for it is well settled that when an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument, the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication. The limits of the 'necessary implication' are indicated by S. 188 of the Contract Act. If necessity for the loan be made out, then the principal becomes bound by the terms of S. 188 of the Contract Act. But here no necessity has been made out. The creditor is therefore entitled only on the theory of 'unjust enrichment' to recover from the principal moneys which have been applied for the benefit of his estate by the wrongful or unauthorised act of the agent and such right cannot be affected by the fact, even if it be a fact, that the agent had misappropriated moneys belonging to the principal unless it was proved that the creditor was aware of and was a party to the agent's misconduct.

(1894) 2 Q.B. 40, followed and (1906) 1 K.B. 103, explained.

(1915) M.W.N. 761; 1 C.L.J. 199; 6 C.L.J. 639 and A.I.R. 1936 Bom. 66 have applied this equitable rule in this country. If

necessary the creditors' claim in a case of this kind may be rested on S. 69 or S. 70 of the Contract Act.

Where as here the principal is sought to be held liable on equitable grounds along with the agent in the same action, the principal can be made jointly liable with the agent, though a decree has been passed against the agent.

(1926) A.C. 761 and 4 A.C. 504, distinguished as cases where the principal is subsequently sued on the contract.

I.L.R. 49 Mad. 900, doubted.

S. Srinivasa Aiyangar and *K. Rajah Aiyar* for Appellant.

S. Panchapagesa Sastri and *K. R. Krishnaswami* for Respondent.

S.V.V.

Varadachariar, J. C. R. P. No. 1710 of 1934.
19th March, 1937.

Civil Procedure Code, O. 9, r. 13—Petition to set aside an order of the Hindu Religious Endowments Board—Petition dismissed ex parte—*Application to set aside* ex parte *order—If maintainable.*

Where in a petition filed to set aside an order of the Hindu Religious Endowments Board, the petitioner was declared *ex parte* and petition was dismissed, the Court has jurisdiction to set aside the *ex parte* decree for sufficient cause under O. 9, r. 13. Though the Civil Procedure Code is not expressly made applicable to proceedings under the Endowments Act, yet when by a provision in it a matter is brought before the Civil Court, then those proceedings are governed before the Civil Court by the Civil Procedure Code.

37 M.L.J. 162, doubted and distinguished; 65 M.L.J. 315, followed and I.L.R. 57 Mad. 271, relied on.

K. S. Desikan for Petitioner.

K. Subba Rao for Respondent.

S. V. V.

Varadachariar and Pandrang Row, JJ. A. S. No. 263 of 1932.
19th March, 1937.

Hindu Law—Widow—Maintenance—Widow living apart—Not invalid—Needs of the remaining coparceners—How far valid—Considerations.

A Court of law dealing with a question of maintenance can only aim at an approximate estimate of the reasonable requirements of persons in the position of the claimants. In such matters the Court should as far as possible divest itself of any desire to

penalise the conduct of the widow in choosing to live apart unless it be for improper reasons. Undue stress ought not to be laid on the needs of the remaining coparceners to the prejudice of the widow's claim to a decent and comfortable provision for her maintenance, taking into account the share to which her husband was entitled, which represents only the maximum available.

Sir A. Krishnaswami Aiyar and *K. Subramaniam* for Appellants.

K. S. Krishnaswami Aiyangar and *S. Ramachandra Aiyar* for Respondent.

S.V.V.

Venkataramana Rao, J. S. A. No. 1889 of 1931.
25th March, 1937.

Inam—Suit by inamdar—No presumption that he is owner of both warams—Proof that he is owner of both warams—To prove tenancy.

When an inamdar comes to Court alleging that he is the owner of both the warams, no presumption can be made that the grant was of both the warams, and it is incumbent on him to prove the affirmative of the issue. Even assuming that he establishes that he is the owner of both the warams in order to sustain an action in ejectment he must prove that the defendant was let in under a terminable tenancy which entitled him to eject him from the land.

30 L.W. 583, doubted as not strictly accurate in view of I.L.R. 45 Mad. 586.

32 C.W.N. 160 and 51 M.L.J. 510, relied on.

39 M.L.J. 629 and 47 M.L.J. 558, followed.

R. Desikan for Appellant.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for Respondent.

S.V.V.

Venkatasubba Rao and Cornish, JJ. Appeal No. 60 of 1933.
16th March, 1937.

Civil Procedure Code (V of 1908), O. 41, r. 20—Scope of—Necessary parties—Non-addition of—Appeal barred on date of addition as against them—If Court can act under O. 41, r. 20—Test.

A partition suit was filed in a family which owned considerable properties in Tanjore District, but the family except the 6th defendant is now reduced to such straits that some are represented by the assignees in insolvency and some by the trustees under a composition deed. In the action originally the family was divided into three branches, the first consisting of one plaintiff, the second of defendants 1 and 2 and the third of defendants 3 to 8. The preliminary decree of 1924 made by the trial Court separately allotted to the sixth defendant of the third branch a distinct share, the integrity of this branch not having been otherwise disturbed. Defendants 3 to 5, and 7 and 8 form 2 sub-families. (1) 3rd defendant and his sons defendants 5 and 7, and (2) defendant 4 and his son defendant 8. An appeal from the preliminary decree was filed to the High Court. Pending the appeal defendant 3 became an insolvent in 1925 and defendant 4 in 1927 and this Court effected a further sub-division of shares as between defendants 3 and 4. After the case went back, the trial Court passed a final decree in due course. The preliminary decree held that defendants 3 to 8 were jointly accountable to the other branches of the family in respect of certain matters, but the point yet remained to be decided as to how much of this common burden each of the sub-groups is to bear. The trial Court passed a final decree directing among others (1) that defendant 6 shall pay Rs. 2,000 odd to plaintiff's branch, Rs. 10,000 odd to defendants 1 and 2, and Rs. 18,000 odd to defendant 4's branch; (2) that 3rd defendant's branch shall pay 4th defendant's branch Rs. 10,000 odd. The 6th defendant filed this appeal contending that the trial Court has wrongly apportioned the liability and that according to him third defendant's branch will have to pay him a large amount. Defendants 3 and 4 were impleaded as respondents but not their sons and it was contended that they were necessary parties and the appeal is therefore incompetent as by accepting the appellant's contention, the sons will indirectly be affected to their prejudice.

Held, that the sons though proper parties are not necessary parties in the circumstances. The High Court decree did not direct an *inter se* division notwithstanding the insolvency of defendants 3 and 4. Though the sons were formally on record in the lower Court they had no separate entity and the decree passed did not recognise their existence.

N.R.C.

Further the defect is one which can be cured under O. 41, r. 20, C. P. Code. The argument that no person against whom the right of appeal has become barred can ever be added as a respondent under O. 41, r. 20 is not correct, because if correct O. 41, r. 20 can never be brought into play, especially as under the rule the action is to be taken *at the hearing* of the appeal. The test is "would the parties not impleaded be prejudiced by modifications made behind their backs in the decree under appeal".

L.R. 55 I.A. 7 and I.L.R. 9 Rang. 624, distinguished.

I.L.R. 31 Mad. 442, relied on.

The fifth defendant had died during the pendency of the lower Court. There was an appeal by defendant 9 to the Privy Council. In that appeal 5th defendant's sons were brought on record as his legal representatives.

Held, that substitution of a new party for one stage of a suit is effective for all future stages of that suit and therefore the 5th defendant's sons were to be regarded as having been constructive parties in the lower Court and the Court ordered them and the defendants 7 and 8 to be added as parties.

V. Radhakrishnayya for *S. Ramanuja Aiyangar* for Appellant.

T. R. Venkatarama Sastriar and *K. S. Desikan, C. S. Vidyasankaran* for *N. A. Krishna Aiyar, T. R. Srinivasa Aiyangar, S. Venkatesa Aiyangar, S. R. Subramania Aiyar, P. R. Ganapathi Aiyar, N. K. Padmanabhan, K. Bashyam, V. C. Viraraghavan, R. Visvanatha Aiyar, S. Tyagarajan* and *R. Rajagopala Aiyangar* for Respondents.

S.V.V.

Venkataramana Rao, J. S.A. No. 726 of 1935.
25th March, 1937.

Contract—Contract to sell land—Three members of an undivided Hindu family entering into the contract—One of them a minor—If contract void for want of mutuality—Minor adopting the contract after attaining majority—Contract specifically enforceable.

A contract to sell property to defendant for Rs. 1,500 was executed on 4th August, 1930, by the first and second plaintiffs and by the third plaintiff through his elder brother and guardian the first plaintiff, as he was then a minor. The three plaintiffs were members of an undivided Hindu family of which first plaintiff was the manager. An advance of Rs. 25 was also paid by the defendant and possession of the property was given over to him on the said date. It was alleged to be sold for family debts but it

was found that that was not a family debt. Third plaintiff became a major and all the three plaintiffs then filed the suit for specific performance of the contract and for recovery of the balance purchase money. It was contended that there was no mutuality as the third plaintiff was a minor on the date of the contract, that subsequent ratification cannot make the contract valid and that as there was no debt binding on him (third plaintiff) it cannot be treated as a family act by the manager.

Held, that the principle of I.L.R. 39 Cal. 232 is based on the personal incapacity of the plaintiff to enter into the contract at the time the contract was entered into and hence subsequent affirmation by him after attaining majority was held to be immaterial. But this ground cannot be availed of with reference to contracts entered into by a joint family which may consist of minors as well as adults and the family is treated as one entity in its relations with the outside world. The family owns and possesses the property and there is no minor's estate as such.

40 I.C. 142 and I.L.R. 57 All. 374, followed.

It is a contract capable of ratification and when the other members approve of the contract by joining as plaintiffs, the vendee cannot plead that the purpose of the sale is not one binding on the family.

(1830) 1 Russ. and My. 293 and (1842) 2 Y. and C. Ch. 54, applied.

I.L.R. 26 Mad. 74 and I.L.R. 32 Mad. 320, relied on.

P. Somasundaram for Appellant.

P. Satyanarayana Rao for Respondents.

S.V.V.

Varadachariar. J. C. S. No. 573 of 1932.
31st March, 1937.

Copyright—Book on Geography—Parties borrowing from common sources—Effect of—When an infringement of copyright.

The plaintiffs were the sons of one *C* who had a copyright in a book on Geography and the suit was filed against the first defendant author and the second defendant the publisher of another book on Geography complaining that the defendants' book is an infringement of the copyright on the ground that the defendants have reproduced in their book substantial portions of the plaintiff's book with alteration in form of words only or with colourable variations. The main defence was that the defendants' book was compiled and prepared by the 1st defendant from materials open to all by his independant skill and labour without availing himself of the labours of the plaintiffs. It was

found that there were a number of books bearing on the subject on the market at or about the time when the plaintiff's book and the defendants' book were published and that large portions of the plaintiff's book have been based upon another book in English on the subject by one *T*.

Held, that a book like this could, in certain circumstances, be the subject-matter of copyright (I L.R. 48 Bom. 308). But there is a difference between what may be described as an original work and a book which is only in the nature of a compilation prepared from materials open to all. In the latter case, the fact that one man produced such a work does not take away from any one else the right to produce another work of the same kind, and in doing so, to use all the materials open to him. This liberty is however qualified by the principle that the product of the labour and skill of one man must not be appropriated by another.

In more than one reported decision the Court has come to the conclusion in favour of the infringement of copyright on the ground of similarity between the two works.

I.L.R. 48 Bom. 308; I.L.R. 43 All. 412 and 34 C.W.N. 540.

But in some cases the Court has refused to draw the inference of infringement from the similarity and when such infringement is to be established by intrinsic evidence consisting of a large number of similarities, such evidence must be of a cogent character sufficient to give rise to an irresistible inference that one work was copied from the other.

64 M.L.J. 193 and 39 C.W.N. 945.

The question whether the similarities pointed out between the two works are such as to lead to the inference of piracy is necessarily one of fact and degree.

V. Radhakrishnayya for Plaintiff.

K. Rajah Aiyar, S. G. Rangaramanujam and *T. R. Narasimhan* for Defendant.

S.V.V.

Cornish, J. C. R. P. No. 1079 of 1935.
2nd April, 1937.

Indian Partnership Act (IX of 1932), S. 69—Effect of non-registration—Construction of S. 69.

Where plaintiff attached before judgment certain indigo as belonging to the defendant, and thereupon *A* and *B* filed a petition under O. 21, rr. 49 and 58 and O. 38, r. 8 requesting the Court to raise the attachment alleging that they were partners along with the defendant but the Court dismissed the application holding that S. 69 of the Indian Partnership Act prohibited the trial of such an application as the partnership alleged was not registered.

Held, that (1) S. 69, sub-S. (1) provides that no suit to enforce a right arising from a contract shall be instituted by a member of a firm suing as a partner against the firm unless the firm is registered and sub-S. (2) provides that no suit to enforce a right arising from a contract shall be instituted by or on behalf of an unregistered firm against a third party.

(2) Sub-S. (3) applies the provisions of sub-Ss. (1) and (2) to claims by way of set-off or other proceedings to enforce a right arising from a contract.

(3) The meaning of sub-S. (3) is that the prohibition against a suit by the member of an unregistered firm or by an unregistered firm against a third party to enforce a contract is extended to other proceedings which have for their purpose the enforcement of a right arising under a contract between the parties to the proceedings.

(4) Here *A* and *B* are seeking to enforce no right which depends on any contract between them and the plaintiff and the right which they have, and which they are seeking to enforce does not depend on contract, but on the provisions of the Civil Procedure Code governing the attachment of partnership property and hence S. 69 is no bar to the trial of the application of *A* and *B*.

Kasturi Seshagiri Rao for Petitioners.

Ch. Raghava Rao for Respondent.

S.V.V

Varadachariar and Pandrang Row, JJ. Appeal No. 269 of 1931.
9th April, 1937.

Tort—Damages—Wrongful attachment of A's *property as* B's—B *summoned as a witness by Court—Non-appearance of—Proceedings by Court under O. 16, r. 10, Civil Procedure Code—Order to attach* B's *property—Amin attaching* A's *property wrongly—If* A *entitled to damages against party at whose instance proceedings under O. 16, r. 10 were started—Immovable property—If rule applies.*

N. R. C.

The first plaintiff was the father of the second and third plaintiffs. The third plaintiff had a son *S* who was summoned as a witness in a suit instituted by the defendant *V S* against certain third parties. He did not appear and *V S* accordingly applied to the Court to take proceedings under O. 16, r. 10, Civil Procedure Code. In the attachment thus issued four items of property were attached as though they were the property of *S*. It was found that they were not the properties of *S* and that *V S* did not act maliciously but that he acted recklessly in attaching those properties as belonging to *S*.

Held, that this is not a case where the proceedings are taken at the instance of a decree-holder who may ordinarily be regarded as the person setting the Court in motion to attach the properties of his judgment-debtor and therefore rightly to be held responsible for pointing out to the Court officer the properties of his judgment-debtor. The proceedings were taken under O. 16, r. 10 to vindicate the authority of the Court though incidentally the particular party who is anxious to secure the presence of a witness may also benefit if as a result of the proclamation or attachment the witness should ultimately appear. If the witness does not appear the property is attached or sold only for the purpose of realising the fine and not for the purpose of paying any money to the party who required his attendance. Therefore a person who asks the Court to take proceedings under O. 16, r. 10 cannot be placed on the same legal basis as a decree-holder who moves the Court for his benefit to attach certain properties as the properties of his judgment-debtor.

The question how far the principle of I.L.R. 17 Cal. 436 that where property of a person who is not a party to the suit is *wrongly* attached (no finding of malice or want of reasonable care is necessary for that purpose) he will be liable for damages can be applied to the case of attachment of immovables where the only effect of attachment is to prohibit alienation of property attached and not to remove the property out of his possession left open.

B. Somayya for Appellant.

K. Krishnaswami Aiyangar for Respondent.

S.V.V.

Varadachariar and Pandrang Row, JJ. Appeal No. 559 of 1930.
5th April, 1937.

Government of India Act, 1919, S. 96-B—Income-tax Officer—Dismissal of, by Commissioner—Suit for damages—If maintainable —Previous approval of Local Government, if necessary to dismissal —Commissioner, if can dismiss—Commissioner himself an appointing authority.

The appellant who had been appointed Income-tax Officer in June, 1922, was dismissed from service by an order of the Commissioner in 1925. He filed this suit for damages contending that the order of dismissal was illegal, void and *ultra vires*, on the grounds (1) that the Commissioner did not hold a proper enquiry before passing the order of dismissal, and (2) that in view of the provisions of S. 96-B of the Government of India Act, 1919, the Commissioner was not competent to pass the order of dismissal.

Held, that while a solemn duty is laid upon the Government to observe these rules made under S. 96-B when dealing with the matter of the dismissal of an officer, the failure to do so will nevertheless not furnish a cause of action for a civil suit.

L.R. 64 I.A. 55, followed.

The fact that a right of appeal was given to the Governor in Council shows that it is not necessary that previous approval of the Local Government should be had for dismissing an officer, as it could not have been contemplated that dismissal should be with prior approval obtained from the same authority, which is also the appellate authority.

Assuming that in view of *Rangachari's case*, (1937) 1 M.L.J. 515 (P.C.), the appellant may be entitled to some relief, if it could be said that the Commissioner who dismissed the appellant is within the meaning of S. 96-B an authority 'subordinate to that by which he was appointed', it cannot be said that the Commissioner is a subordinate as he is the appointing authority.

The natural meaning of S. 5 of the Income-tax Act is that the Commissioner is the appointing authority, though by way of appeal or by way of veto or even by an executive rule as to previous approval, his exercise of the power may be subject to interference by the Governor-General in Council or by the Governor-in-Council to whom it has been delegated by him. The Commissioner is not therefore a person subordinate to the appointing authority within the meaning of S. 96-B.

T. R. Venkatarama Sastri and *N. Rajagopala Aiyangar* for Appellant.

M. Patanjali Sastri for Respondent.

S. V. V.

N. R. C.

The Chief Justice and Cornish, J. O. S. A. No. 13 of 1937.
6th April, 1937.

Presidency Towns Insolvency Act (III of 1909), Ss. 7 and 36—Examination by Official Assignee under S. 36 of insolvent's wife—Examination to discover information regarding title to property standing in wife's name—Plea that it was husband's property—Title disputed by wife—Application by Official Assignee under S. 7 for declaration that property was the insolvent's—If examination made by him under S. 36 a bar.

Where the Official Assignee in *P's* insolvency examined *P's* wife relating to the title to certain properties standing in the wife's name and in her possession to elicit information from her with a view to find out if it was not standing benami in her name for the insolvent, and the wife claimed that it was her property, and where the Official Assignee later took out an application under S. 7 for a declaration that the property belonged to the husband,

Held, that the application is maintainable and is not barred by the proviso to S. 7 as the prior examination does not fall under S. 36, cl. (5) which contemplates only cases where title to property is admitted to be in the insolvent and the only question in issue is the right to possession. The amendment of the section has not affected this question.

25 M.L.J. 308, followed.

I.L.R. 52 Mad. 717; I.L.R. 55 Mad. 385 and I.L.R. 54 Cal. 251, referred to.

V. Rajagopala Aiyar and *K. G. Srinivasa Aiyar* for Appellant.

K. S. Krishnaswami Aiyangar for Respondent.

S.V.V.

The Chief Justice and Cornish, J. O. S. A. No. 19 of 1937.
6th April, 1937.

Specific Relief Act (I of 1877), S. 45—Government of India Act, 1919—S. 96-B and Rules made thereunder—R. 55, Civil Services (Classification, Control and Appeal) Rules—Appointment by Central Board of Revenue—Enquiry into charges by a lower authority—If valid—Right of officer charged to be represented by Counsel at the enquiry.

The appellant, who was an Inspector of Salt and Customs before, was on 16th March, 1936, appointed as an Assistant Commissioner of Salt and Customs, Central Division, Madras, by the Central Board of Revenue, Delhi. Certain charges had been made against the appellant and served on him for filing a written statement and an enquiry was being conducted by the Collector of Salt Revenue, Madras, under R. 55 of Civil Services (Classification, Control and Appeal) Rules. The appellant thereupon filed an appli-

cation under S. 45 of the Specific Relief Act to restrain the Collector from holding the enquiry contending that the enquiry by him was illegal as (1) the body which has authority to remove, dismiss or reduce the appellant was the Central Board of Revenue which appointed him and therefore the enquiry should be held by them and not by the Collector, and (2) the appellant was not permitted to appear by counsel at the enquiry when the evidence was being taken on the charges.

Held, that the order of dismissal can only be passed by the Central Board of Revenue in view of S. 96-B (1) of the Government of India Act, 1919, as that is the authority that appointed him. But an enquiry can be held by another officer as r. 55 contemplates an enquiry by some authority other than the authority having the power of dismissal, removal or reduction inasmuch as it says "If he (applicant) so desires or if the authority concerned so *direct,* an oral enquiry shall be held" and again speaks in the proviso of the "*Officer* conducting the enquiry". The Board will have this evidence and the finding before it in deciding the applicant's case before passing orders in the matter.

12 C.W.N. 842 and I.L.R. 15 Cal. 152, distinguished.

As for the second objection, the officer charged is not entitled to be represented by counsel at the enquiry, because the rule definitely says that he shall be heard *in person.* The question is not whether an advocate has a right to appear or not but whether his client has a right to be represented by him, that is to say, is the enquiry one at which the person charged is entitled to appear at all or to appear in person only, or by himself or by his agent. There is no right at Common Law to appear by an agent or counsel. A right given by Statute to a person to be heard 'by himself' means that he has no *right* to be heard through anybody but himself. If the client is expressly denied the privilege of being heard by counsel S. 14 of the Bar Council's Act will not save him from the disability.

K. S. Jayarama Aiyar, K. Venkataraghavachariar and *V. K. Parthasarathy Aiyangar* for Appellant.

The Advocate-General (Sir Alladi Krishnaswami Iyer) for Respondent.

S.V.V.

Venkataramana Rao, J. C. R. P. No. 275 of 1937.
14th April, 1937.

Court-fee—Suit for partition—Prayer for injunction restraining creditor from proceeding against plaintiff's share—Sons not parties to the documents evidencing the debts—Proper prayer is therefore only for declaration—Court-fee payable as for declara-

tion—Suit in Sub-Court—Amount of debts within District Munsiff's jurisdiction also—If court-fee payable as suit in District Munsiff's Court or as in Sub-Court.

A suit was filed in a Sub-Court for a partition of joint family properties of the plaintiffs and their father, the first defendant. The plaintiffs were entitled to ⅔ share therein. They sought partition and delivery of possession of their separate share and also an account of the income of the properties. Defendants 2 to 14 were creditors of the father and the plaintiffs questioned the binding nature of the said debts and therefore claimed that they were entitled to be put in separate possession of the properties without any liability for the debts in favour of the defendants and asked for an injunction restraining the defendants from seeking any relief against the plaintiff's share of the family properties. From the allegations in the plaint it appears that the debts were contracted by the father and the plaintiffs were not parties to the said deeds or documents evidencing the debts. If therefore a suit were brought on them, the creditor would have to make out that the debts were such as under the Hindu Law would be enforceable against the son's shares in the family properties. No suits were filed or decrees obtained by anybody other than the twelfth defendant.

Held, that therefore the only relief to be sought for is a declaration that the said debts are not binding on them or their shares and therefore no injunction is necessary. The fact that the plaintiffs choose to frame the relief in the form of an injunction would not make the action any the less an action for a declaration. The principle to be kept in view in determining the proper court-fee is what in substance is the relief which the plaintiffs seek and not the form in which it is couched. The court-fee must therefore be paid under Sch. II, Art. 17-A as for a declaration.

I.L.R. 58 Mad. 821, followed.

Six of the debts were each less than Rs. 2,500 and therefore cognisable by a District Munsif and it was therefore contended that court-fee payable on each of them was at Rs. 15 as a plaint in a District Munsif's Court.

Held, that as the plaintiff chooses to present his plaint in the Sub-Court he must pay stamp duty prescribed for presentation of such a claim in that Court and must therefore pay Rs. 100 for each declaration.

T. R. Venkatarama Sastri, S. Panchapagesa Sastri and *K. R. Krishnaswami Aiyar* for Appellant,

The Government Pleader (K. S. Krishnaswami Aiyangar) for the Government.

C. A. Seshagiri Sastri, R. Viswanatha Aiyar and *S. Thyagaraja Aiyar* for Respondents.

S.V.V.

Varadachariar and Pandrang Row, JJ. Appeal No. 258 of 1931.
14th April, 1937.

Vendor and purchaser—Contract to sell land—Purchaser directed to pay purchase price to vendor's creditors—Provision that if more than the price amount is paid, vendee may recover from vendor the excess—Payment of creditors—Debts of greater value paid off—Amount actually paid only less than sale price—If vendor entitled to excess of debts paid.

The plaintiff brought a suit for specific performance of a contract to sell land to him. The suit properties were agreed to be sold to the plaintiff for the purpose of discharging certain debts due by the family of the defendants, but as there was some delay in completing the sale transaction, the plaintiff was requested to pay off the creditors even before the execution of the sale deed and he was assured that the amount so paid might be adjusted towards the sale price and that, if the plaintiff had to pay to the creditors anything in excess of the sale price, the same would be made good to him with interest. It is not that the plaintiff paid more than the sale price to the creditors. But he managed to get a transfer of the documents held by the creditors, on payment of a smaller amount than was actually due under those documents and he claimed that he was entitled to get the benefit of the remission given by the creditors.

Held, that in making disbursements out of the sale price; the plaintiff was only acting as the agent of the defendants and he was not entitled to retain for his own benefit any remission that he obtained from the creditors, in the absence of a contract to the contrary. The contract pleaded is not sufficient for this purpose because that contract is only to the effect that any excess paid by the plaintiff would be made good to him.

Ch. Raghava Rao for Appellant.

C. Sambasiva Rao for Respondents.

S.V.V.

Venkataramana Rao, J. S. A. No. 209 of 1933.
14th April, 1937.

Hindu Religious Endowment—Office-holder of a mutta—Payment of a fixed allowance to a temple from a long time—Muttadar a non-worshipper—If payment voluntary and unenforceable—Presumption in case of such payments.

Whoever held the office of the muttadar of *T* mutta was paying four garces of paddy to the trustees of the suit temple direct from a long time. The muttadar was not one who belonged to a sect that was accustomed to worship Hindu deities.

Held, that the fact of payment in kind seems to suggest that it is to be paid out of the produce of *T* mutta which forms the emoluments of the office of the muttadar. It is well known that Hindu Sovereigns in ancient days made similar grants of annuity to Hindu temples for its upkeep and when payment is intended or directed to be made from and out of the produce, it is held to be a charge and such charges are not unknown to Hindu Law. Especially when it is made by one, who does not believe in the worship of the Hindu deities and is not accustomed to worship them, it cannot be said to have been done as an act of piety and it must be presumed that there was some reason which obliged a person like the muttadar of *T*, a non-worshipper to make the payment. The presumption of a voluntary payment which may arise in the case of an ordinary worshipper would not arise in this case. Where a customary payment has been made for a long number of years, the presumption generally is that the payment was not made voluntarily or out of generosity. It is open to the Courts to infer a legal origin for such a payment where it is legally possible and such presumption can be made even in cases of payments made towards charity. As whoever is the office-holder makes this customary payment, it must be deemed that the payment is one which attaches to the mutta. It can therefore be inferred that this payment is in the circumstances payable *virtute tenurae*.

I.L.R. 17 M. 43; 13 M.L.J. 379; I.L.R. 42 M. 197, distinguished.

S. A. Seshadri Iyengar for *B. Jagannadha Das* for Appellant.

C. S. Venkatachariar for Respondent.

S.V.V.

Varadachariar and Pandrang Row, JJ. Appeal No. 289 of 1931.
16th April, 1937.

Deed—Construction—Mortgage—Date for payment of interest and principal mentioned—Provision in case of default for payment of interest on arrears of interest—If takes in interest accrued due after principal became due.

A mortgage bond dated 6th September, 1915, provided that the mortgagor shall pay Rs. 2,000 at 9 per cent. per annum on the 6th September every year. The next clause provides that the principal amount shall be paid by 7th September, 1915. Then followed the following clause:—" In default of payment of interest and principal on the dates aforesaid, you shall realise the amount of arrears with interest thereon at 3/4th per cent. per mensem from

the stipulated date until the date of payment". The plaintiff claimed interest not merely on the arrears of interest accrued due between September, 1916 and September, 1918 but also on the amount of interest accruing each year, subsequent to 1918 so long as such interest remained unpaid.

Held, interest on interest is not the ordinary rule and there is the further difference that after 1918 the mortgagee is entitled to sue, whereas before that date he was not expected to sue. In the light of these considerations the document contemplates the final default once for all in September, 1918 and not successive defaults thereafter and therefore no interest was contemplated on interest for period subsequent to 1918.

T. M. Krishnaswami Aiyar and *T. K. Sarangapani Aiyangar* for Appellant.

S. Panchapagesa Sastri for 1st Respondent reported no instructions.

S.V.V.

Venkataramana Rao, J. S. A. No. 511 of 1933.
16th April, 1937.

Water—Water-courses—Natural stream—Customary flow of water to a thangal—Diversion of flow to a tank—User through tank for nearly 30 years but less than 60 years—Ayacut under the tank increased by Government and cist for village also thereby increased—Implied recognition by Government of this as the customary supply—Obstruction to flow of water to the tank by lower villagers—If suit for injunction against them maintainable.

The plaintiff as representing village *D* brought a suit against the defendants as representing the neighbouring village *A*. The subject-matter in dispute related to the right to the water from a natural stream which flowed through the village *D*. The plaintiffs claimed the right to divert the water by means of a dam through a channel to a tank in the village for the purpose of irrigating the lands east of the said tank which are registered as wet lands under the ayacut of the said tank. Originally till 1893 the extent of acreage registered under its ayacut was 11 acres. 65 cents. but after 1893 the water was diverted by means of this dam to the tank and by reason of the increased supply the ayacut was increased to 94 acres 73 cents. The Government cist for the villages also had increased from 381 in 1890 to 1010-2-0 at the re-settlement. No diminution of supply to the defendant's tank in consequence of the diversion was proved. It was found that the water of the natural stream which was until 1893 falling into a thangal and exclusively used by the plaintiffs was diverted in 1893 into the tank and ever since for the past 30 years it has been the

customary method to take the water of the stream from that channel to augment the supply of the tank without which supply it would be impossible to cultivate the 94 acres registered as wet. The defendants obstructed plaintiffs from repairing the dam and also dug a channel near by which prevented the water from being taken to the tank. Hence this suit was filed.

Held, that the plaintiffs were entitled to succeed. It may be that the plaintiffs have not acquired this customary right to water by prescription as against the Government as the supply has been only for nearly 30 years. A ryot in respect of ryotwari land is entitled to receive from the Government a supply of water necessary and sufficient for the irrigation of his registered wet fields. The Government have got the right to regulate the method and manner of supply. They can therefore indicate to him the source or method of supply and he is bound to accept those indicated. As incident to the tenure, there is a right in the ryot to receive the said water and a corresponding duty on the part of the Government, though in one sense negative, to see that the supply shall be at his disposal by the usual and customary method. The Government by having diverted the channel water from the thangal and having increased the wet ayacut and the assessment, must be taken to have impliedly recognised this as the customary method of supply for the time being for the irrigation of the wet fields under the tank. The plaintiffs must be deemed to have a right to the said water conferred on them by the Government and any interference of such right is actionable.

M. S. Venkatarama Aiyar for Appellants.

T. M. Krishnaswami Aiyar and *N. Sivaramakrishna Aiyar* for Respondents.

S.V.V.

Venkataramana Rao, J. S. A. No. 46 of 1936.
16th April, 1937.

Trust—Trespasser on trust property—Suit by beneficiaries for possession—If maintainable.

The plaintiffs as representing the Mussalmans of *F* town brought a suit against the 1st defendant, who was alleged to have trespassed and built upon the suit land which was claimed to be an adjunct of *J* mosque at which the plaintiffs congregated and worshipped, etc. The suit was for an injunction directing the demolition of the shed, etc., put up by the defendant thereon, for possession of the same to the plaintiffs on behalf of the mosque and the Mussalman public of *F* and such other reliefs as the Court may deem fit to grant. The 1st defendant pleaded that this was not mosque property, that the 26th defendant was the muttawalli and the plaintiffs had no right to maintain the suit for possession. The Subordinate Judge dismissed the suit holding that the plaintiffs as worshippers of the mosque cannot maintain the suit for possession and did not go into the other questions of fact.

Held, where there is a lawful trustee for an institution, he is ordinarily the person competent to institute a suit in relation to the property of the institution, to take the necessary steps for safeguarding and preserving it and to eject a trespasser and to recover possession thereof for the trust; but the recovery of the property is only for and on behalf of the institution which he represents. But where the trustee has alienated the trust property and therefore would not proceed to recover possession of the same or has otherwise disabled himself from maintaining a suit in respect thereof or declines to institute a suit, it cannot be said that the institution is without a remedy. The worshippers who are the beneficiaries entitled to participate in the benefits of the institution are entitled to maintain a suit for preserving the trust property or restoring the property to the trust either by instituting a suit for a declaration or for an injunction or even for possession but whether the worshippers are entitled to claim all or any of the reliefs which a trustee is entitled to do in a properly framed suit would depend on the circumstances of each case. It is desirable and necessary to make the trustee a party to the suit and where he is made a party, it is open to the Court to mould the relief as the circumstances may require. The cases like I.L.R. 23 Mad. 99 and 27 M.L.J. 270 only lay down that actual possession cannot be given to a worshipper if there is a duly constituted representative for the institution but it is open to the worshippers to sue on behalf of the trust and in right of trustee (I.L.R. 41 Mad. 124 and 20 M.L.J. 151) and where the trustee is a party there is nothing to prevent the Court delivering possession to him. If it be found that there is no representative at

the time, the Court may award possession to the plaintiffs on behalf of the trust so that when appropriate proceedings are instituted for the management of the trust property and a trustee is appointed, they may hand over possession to him.

Case-law discussed.

B. Sitarama Rao and *B. Pocker* for Appellants.

K. Kuttikrishna Menon for Respondents.

S.V.V.

Varadachariar, J. S. A. No. 722 of 1933.
27th April, 1937.

Partnership—Dissolution—Accounts settled between the partners—If suit for dissolution lies afterwards—Art. 106, Limitation Act—Transfer from partnership to individual partners—If deed requires registration.

The plaintiff brought a suit for the recovery of his 1/3rd share in certain items of immovable property. It was his case that his deceased brother *Y*, the second defendant and *N*, the father of the first defendant were partners in an Abkari business from 1892 to 1904, that out of the funds of that business they purchased the suit properties, that in 1904 there was a dissolution and settlement of accounts under Ex. A and that under it provision was made for the discharge of debts and for division of the outstandings and that as regards the immovables the three partners should be entitled to equal shares therein. The plaint also added that for long after *A*, *Y* and after his death plaintiff was receiving his 1/3rd share of his income. The first defendant never asserted an exclusive title in himself to the knowledge of the plaintiff.

I.L.R. 45 Mad. 378 shows that on a dissolution the partners may settle the accounts of the partners between themselves. As that is what is done here, there is no longer any question of a suit for dissolution and accounts within the meaning of Art. 106. Ex. A is a memorandum embodying the settlement between the partners as to their respective rights on settlement of accounts of that partnership.

11 I.C. 288, distinguished.

It may not be correct to speak of a transfer of title from the partnership to the partners individually as the reasons for insisting upon the registration of Ex. A.

I.L.R. 55 Mad. 72, relied on.

Though Ex. A is not a transfer from the partnership to the individual partners a settlement like Ex. A may on a dissolution vest the immovable properties of the partnership in the former partners in proportions very different from the interests held by

them during the subsistence of the partnership. Then there may be a question of limitation. But here shares were equal and therefore no registration is necessary.

Ch. Raghava Rao for Appellant.

Kasturi Seshagiri Rao for Respondent.

S.V.V.

Varadachariar, J. S. A. No. 736 of 1933.
27th April, 1937.

Construction—Deed—Gift by a Hindu to his daughter—Rules of construction.

A father executed in favour of his daughter a deed of gift. The donee died without issue within a couple of years after it. The son-in-law thereupon filed a suit to recover the gifted properties.

Held, in interpreting the document two considerations have to be borne in mind: (*i*) that a Hindu father making a gift to his daughter ordinarily desires that that property should devolve only on the children born to her and not upon other heirs in her husband's family and (2) that such a parent making a gift to his daughter soon after her marriage thinks it inauspicious to refer in terms to her death without issue and often employs circumlocutory language to indicate that contingency.

Cases from I.L.R. 4 Cal. 23 recognise that as a matter of law it is possible to make a gift which in one contingency will carry an absolute estate but as the result of a gift over clause or of a cesser clause be cut down in effect to a life interest in certain other contingencies. Where in the later portion the document made an exception against the passing of the estate to other heirs than the donee's descendants, it has to be construed as an attempt to indicate that she should take a heritable estate only if she had descendants of her own body to inherit the estate.

A. Lakshmayya for Appellant.

V. Govindarajachari for Respondents.

S.V.V.

Varadachariar, J. S. A. Nos. 761 and 762 of 1933.
28th April, 1937.

Madras Irrigation Cess Act (VII of 1865) as amended by the Amending Act (V of 1900), S. 1, proviso (2)—Water taken by a ryotwari holder through the customary sluice—Obstruction up the stream—Consequent flow of larger volume of water—Ryotwari holder no party to blocking up of channel above—If liable to pay water cess therefor—If holder 'used' the water.

Appellant is the owner of ryotwari land registered as wet and on the occasion in question water flowed on to his land only through the sluice through which he is authorised to take water. All that is found is that because there was some obstruction caused by some unknown person to a sluice much lower down, the water banked up in the channel with the result that through the customary sluice of the appellant a greater volume of water than would otherwise have flowed did happen to flow. The appellant had no hand in the blocking of the channel at the lower point.

Held, the principle of I.L.R. 59 Mad. 107 and L. P. A. No. 10 of 1936 applied, because the appellant could not be said to have 'used' the water in the sense explained there. There is no distinction in principle merely because in those cases the water flowed through a breach in the channel, whereas here the excess flow was the result of Boundary's Act in blocking up some lower sluice. If the appellant had in some way been connected with the blocking of the sluice, the position might be different.

K. S. Sankara Aiyar and *T. V. Rajagopal* for Appellant.

The Government Pleader (K. S. Krishnaswami Aiyangar) for Respondent.

S.V.V.

Venkataramana Rao, J. S. A. No. 421 of 1933.
29th April, 1937.

Madras Forest Act (V of 1882)—Estate not owned by Government—Forest Act how far applicable—Produce—Non-payment of seigniorage—Sale of produce—Suit to recover value of produce—Entitled only to sale proceeds.

To estates not owned by Government, like the Parlakimidi estate, only such of the provisions of the Madras Forest Act of 1882 as are specifically made applicable by rules made under the Act would be applicable.

Where forest produce was sought to be removed by the plaintiff, without a permit and without payment of seigniorage due thereon, the produce was detained by the Parlakimidi samasthanam and after some time sold by the samasthanam in public auction as the plaintiff had failed to take the same after paying seigniorage.

Held, in a suit by the plaintiff to recover the value of the produce, he was not entitled to the price but only to what was actually realised at the auction.

K. Subba Rao for Appellant.

D. Ramaswami Aiyangar for Respondent.

S.V.V.

Venkataramana Rao, J. S. A. No. 567 of 1933.
28th April, 1937.

Transfer of Property Act (IV of 1882), S. 78—Mortgage prior in point of time but not registered till later mortgage of the same property in favour of another—Prior mortgage not disclosed to subsequent mortgagee—Gross negligence—Postponement of earlier mortgage owing to non-disclosure.

Plaintiff whose mortgage was executed prior in point of time to but was registered after the mortgage in favour of second defendant, failed to inquire about and obtain possession of the title deeds to the mortgaged property in spite of an express recital in the document that title deeds were handed over to the mortgagee and further entered into an understanding with the mortgagor agreeing to delay registration to keep the mortgage secret and the mortgagor induced the second defendant to take a mortgage on the assurance that there was no previous mortgage and the second defendant insisted on the production of encumbrance certificates up to the date of his mortgage,

Held, the plaintiff was guilty of gross negligence under S. 78 of the Transfer of Property Act which resulted in the second defendant taking a mortgage in the belief that there was no prior mortgage and hence the plaintiff's mortgage was postponed to that of the second defendant.

Gross negligence defined.

Definition of gross negligence as laid down in I.L.R. 56 Cal. 868 at 884, approved.

K. Rajah Aiyar and *D. Narasaraju* for Appellant.

B. Somayya and *N. C. Vijiaraghavachariar* for Respondent.

K.C.

The Chief Justice. C. R. P. Nos. 227 to 231 of 1936.
28th April, 1937.

Local Boards Act (XIV of 1920), S. 228, Sch. IV (1) (a) and 28—Profession tax levied by Panchayat Board—Excess, ground for claim for refund—Civil Court whether precluded from questioning the Panchayat Boards Act—Suit in a Civil Court whether maintainable—Payments of assessees not voluntary.

In a suit by profession tax assessees against the Panchayat Board for refund of excess of profession tax on the ground that the defendant Board was not justified in rejecting the return of income submitted by the plaintiffs and that the defendant in each case acted arbitrarily and illegally by fixing the income without taking any of the matter specified in r. XI-A (4) of Sch. IV of the Local Boards Act into consideration, it was contended by the

N.R.C.

Board that the suits were not maintainable as the jurisdiction of the Civil Courts was excluded by S. 228 to impeach the validity of the assessment made and further that as the payments were voluntary not having been made under protest, the plaintiffs had no cause of action for refund,

Held, (1) that the jurisdiction of the Civil Courts would be taken away only if it was shown that the provisions of the Act had in substance and effect been complied with and that it had not been shown that the return of income by the plaintiffs was incomplete or inaccurate or at any rate that the Panchayat Board had considered the matters specified in r. XI-A (4) of Sch. IV of the Local Boards Act in allotting the class to the assessee for purposes of profession tax, and hence the suits were maintainable;

(2) that the payments, though not accompanied by protest were not voluntary because under r. 28 of Sch. IV to the Local Boards Act the assessee had first to pay the tax demanded before he could appeal challenging the validity of assessment and that a payment made as a condition precedent to the exercise of a legal right or to get an official act done which would not be done but for the payment, could not be said to be voluntary.

67 M.L.J. 566 and 45 L.W. 489, distinguished and explained.

55 M.L.J. 770 at 776, approved and applied.

K. Bashyam Aiyangar for *K. Rajah Aiyar* for Petitioners.

D. Narasaraju for Respondents.

K.C.

[*F. B.*]
The Chief Justice, Varadachariar
and King, JJ.
29th April, 1937.

O. P. No. 181 of 1936.

Income-tax Act (XI of 1922), S. 4—Coffee planter—Plantations in Mysore—Assessee resident in British India—Coffee harvested at Mysore and sent on to Mangalore to assessee's agent there—Coffee cured at Mangalore and sold—If and to what extent assessee liable to be taxed therefor.

The assessee who owns coffee plantations in the Mysore State is a resident of British India (Mangalore). The case stated by the Commissioner states that while he maintains an office in the Mysore territory to supervise the cultivation work there, the labour required for cultivation is recruited in Mangalore, materials required for the estate like manure, tools, spray materials, crop-bags, etc., are purchased at Mangalore, the harvested crops are brought to Mangalore in their raw state to be cured there in the factories of P. L. Co. and the coffee seeds thus

prepared for the market are sold at Mangalore by P. L. Co. as the selling agents of the assessee. As the sale proceeds are received and retained at Mangalore and a separate staff is maintained by the assessee there to attend to the above operations, the Commissioner held that the assessee was liable to be taxed as one carrying on 'business' and receiving the income or profits thereof in Mangalore. The question is if the assessee can claim exemption under the 2nd proviso to S. 4 (2). The basis of the Commissioner's opinion is that when a person who owns lands outside British India sells the produce of those lands in British India, no income, profits or gains can be said to arise or accrue *until the produce is sold* and that in such cases there is accordingly no room for the application of the proviso which only relates to "income . . . arising or accruing" in an Indian State. This emphasises the distinction between the place where the income accrues and the *source* from which it accrues and holds that the proviso is not concerned with the *source*.

Held, that whatever may be said as to profits or gains, the view that *income* from agriculture can be said to arise or accrue only when and where the produce is sold and converted into money is opposed to the reasoning in (1900) A.C. 588. In respect of the produce of land in British India, the Indian Income-tax Act recognises the receipt of income or rent *in kind* as receipt or accrual of income. As such there is no reason why the expressions 'receipt' or 'accrual' of income should not have the same significance when applied in connection with the receipt of produce from lands outside British India. The assessee in this case might well be held by the Mysore State to have *received* the income within that State. If for assessment in Mysore, the assessee can be held to have received the income in Mysore, there is no reason to hold why for the purposes of 2nd proviso to S. 4 (2), the income should not be held to have arisen or accrued in Mysore.

(1900) A.C. 588, followed.

5 I. T. R. 118, dissented from.

Clauses (1) and (2) of S. 4 are not to be read as mutually exclusive so as to exclude the operation of the second proviso to cases falling under sub-S. (1).

I. L. R. 54 M. 691, discussed and distinguished.

As the process between the time when the coffee seeds are picked and the time they are actually sold cannot be regarded as a "manufacturing process" but only a process ordinarily employed by the cultivator to render the produce fit to be taken to the "market", he can claim a deduction not only of the value the coffee bears in a raw state in Mysore but in respect of the whole price realised by the sale of his coffee.

T. R. Venkatarama Sastri, M. Subbaraya Iyer and *V. N. Kuppu Rao* for Assessee.

M. Patanjali Sastri and *C. S. Rama Rao Sahib* for the Commissioner.

S.V.V.

Lakshmana Rao, J. S. A. No. 428 of 1936.
30th April, 1937.

Res judicata—*Co-defendants—Grounds of decision—If* res judicata.

A creditor of *A* filed a suit against *A* and *A's* cousin *B* on the footing that *A* and *B* were members of an undivided Hindu family and that *A* as manager had borrowed that debt for a purpose binding on the joint family and prayed for a decree against *A* and the family properties of *A* and *B*. *A* remained *ex parte*. *B* contested the suit and it was held therein that *A* was not the manager, that the debt was not for any family necessity and that *A* and *B* were divided members. In a later suit filed by *B* against *A* for a declaration that certain properties standing in his name were his exclusive properties,

Held, that the principle of *res judicata* as between co-defendants applied to this case and the finding as to division between *A* and *B* was conclusive in this litigation. The fact that *A* was *ex parte* in the previous suit or that the judgment in the previous suit was based on several findings would not affect the applicability of the principle of *res judicata*. It was open to the Court in this case to find on evidence *aliunde* whether there was a conflict *inter se* between the co-defendants in the previous suit. Not only the actual conclusion in a suit but also the grounds of the decision are *res judicata* in a future litigation.

I.L.R. 39 Mad. 1202, followed.

I.L.R. 53 All. 103 (P.C.) and other cases discussed.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Appellant.

A. C. Sampath Aiyangar for Respondent.

S.V.V.

Varadachariar, J. S. A. No. 796 of 1933.
29th April, 1937.

Civil Procedure Code (V of 1908), S. 47—Suit for possession and mesne profits—Claim for future mesne profits—Decree silent regarding that claim—Later suit for future mesne profits—If barred by res judicata *or under S. 47, Civil Procedure Code.*

The plaintiff instituted O. S. No. 90 of 1924 for recovery of possession of certain properties with mesne profits and certain alienees were impleaded as parties thereto. The defendants to the present suit were defendants 8 and 9 in the former suit. That suit was referred to arbitrators and an award was passed on 13th September, 1926, to the effect that the plaintiff would been titled to take possession of the properties in the possession of the present defendants on depositing into Court on the next Vishu Sankramanam day (middle of April) the sum of Rs. 2,600 for payment to the defendants as compensation for improvements effected by them. The award went on to add that the plaintiff was not entitled to any mesne profits until the deposit was made and it was next observed that "the 8th and 9th defendants being in possession under the term lease are liable to pay rent for the 2 years ending Vishu Sankramanan next, *viz.*, Rs. 100 in all to the plaintiff; from the date of deposit into Court the plaintiff is entitled to recover mesne profits from the 8th and 9th defendants till recovery of possession at the rate to be ascertained if necessary after the deposit". On the filing of this award into Court, a decree was passed on 28th September, 1926, merely to the effect that the award be made a decree of Court. No formal decree was drawn up according to the Civil Procedure Code. The money directed to be deposited was deposited only on 31st August, 1927 and the plaintiff obtained possession through Court on 17th October, 1927. Nearly three years later, the plaintiff filed this suit for recovery of mesne profits between 31st August, 1927 and 17th October, 1927 and for damages for waste committed between the date of the decree and the date of the delivery of possession. The question was if this plea was not barred by *res judicata* and under S. 47, Civil Procedure Code,

Held, that so far as damages are concerned the claim can only be under S. 47 as it is *subsequent* to the decree. The applicability of S. 47 to a claim for damages of this kind is supported by A.I.R. 1923 Bom. 391 and I. L. R. 57 Mad. 68 (33 I. C. 520 observing *contra*). I. L. R. 57 Mad. 68 doubted but followed as the amount involved in this case under this head was small. Future mesne profits were claimed but the mere omission to award the claim for future mesne profits will not bar the maintainability of a second suit for the same. What is referred to as a plea of

res judicata in this connection is substantially a plea of bar under S. 47. As the decree was not drawn up in terms of O. 20, r. 12 directing an enquiry into mesne profits, no further proceedings could have been taken in that suit therefor and hence the second suit is not barred.

57 M.L.J. 728, distinguished as a case where the decree *expressly* directed mesne profits to be ascertained in execution.

B. Sitarama Rao for Appellant.

K. Y. Adiga and *K. P. Sarvothama Rao* for Respondents.

S.V.V.

Varadachariar, J. S. A. No. 818 of 1933.
29th April, 1937.

Res judicata—*Suit on tenancy—Plea that person in possession is colluding with tenant—Dismissal of—Later suit based on title against person in possession—If barred—Plea of title if can be raised in the suit on tenancy.*

The plaint properties belong in Jenm to the *K* tarwad. They were held on kanom by the *P* tarwad. In 1919, one *V*, a member of *P* tarwad, assigned the kanom interest to the plaintiff's uncle *S* and later *S* assigned the interest to the plaintiff *A*. After the assignment to *S* by *V*, the *K* tarwad instituted O. S. No. 335 of 1920 against the karnavan and certain members of the *P* tarwad for arrears of michavaram and got a decree. In execution of that decree, *K* tarwad brought the kanom interest to sale and a member of that tarwad bought it and afterwards assigned that interest to *N*, the present 1st defendant. Prior to the assignment by *S* to plaintiff *A*, one *R* was on the land as a tenant and as *A* suspected that after the Court sale in execution of O. S. No. 335 of 1920 *R* was colluding with *N* and her assignor, she took the precaution of impleading *N* and her assignor in a suit by her (O. S. No. 689 of 1928) for ejectment against *R*. The plaint in that suit was framed as one on tenancy and not on title. She also took care to claim relief against *N* and her assignor who were the 3rd and 2nd defendants in that suit only on the ground of their having got into possession or attempting to get possession in collusion with the tenant *R*. In the trial *A* distinctly stated that she did not want the question of title raised in that suit. The Court found (1) that there was no collusion between the tenant and *N*, and (2) that *N* and her assignor got into possession of these items after the purchase in execution in O. S. No. 335 of 1920 and dismissed the suit. Then this suit was filed against *A* based on title.

Held, the suit is not barred by O. S. No. 689 of 1928. The present suit is not based on the same cause of action as the former suit nor is the claim now put forward one that might and ought to

have been put forward in the former suit. A person who gets into possession in collusion with a tenant in possession is, so far as the landlord is concerned, placed under the same disability as the tenant from calling his landlord's title in question (I.L.R. 13 Mad. 335) and as in the former suit *N* was added only as standing in the tenants' position, no question of title could or ought to have been raised in that suit.

P. Govinda Menon for Appellant.

P. S. Narayanaswami Aiyar for Respondents.

S.V.V.

Pandrang Row, J. C. R. P. No. 838 of 1935.
30th April, 1937.

Provincial Insolvency Act, Ss. 28 and 54—Fraudulent preference—Deed executed by the insolvent for himself and as guardian of his minor undivided sons—Document set aside as a fraudulent preference—If the son's interest also avoided thereby.

Where an undivided Hindu father executed a transfer deed in favour of one of his creditors acting for himself and as guardian of his minor sons and the debts are not shown to be such as do not bind the sons, they being antecedent debts and on an application by the Official Receiver in father's insolvency to set aside the deed as a fraudulent preference the Court sets aside the deed as a fraudulent preference and therefore void as against the Official Receiver, the whole document is thereby set aside and not merely the father's interest. The son's share in the transferred property is also thereby annulled. The fact that the sons are *eo nomine* parties to the document does not make them independent co-obligors, so as to treat their interests as separate from the father. The mere joining of the minor sons does not affect the nature of the transaction which is that of a valid alienation for binding debts by the father.

1934 M.W.N. 801: A.I.R. 1935 Mad. 246, not approved in this respect.

M. Patanjali Sastri and *T. K. Sundararaman* for Petitioner.

K. S. Desikan and *S. V. Venugopalachari* for Respondent.

S.V.V.

Wadsworth and Stodart, JJ. A. S. No. 10 of 1934.
4th May, 1937.

Land Acquisition Act—Failure to claim for a particular ground before officer or in objections—Court if can entertain the objection—Special adaptability—Value to acquiring officer—If can be considered—No purchaser other than acquirer—If yet special adaptability can be considered.

In an acquisition for harbour purposes of land in an estate the land acquisition officer awarded a sum as compensation including therein Rs. 5,000 for damage to the unacquired property of the proprietor by reason of the diversion of a spring situated in the acquired land which helps to irrigate the proprietor's lower garden, the cultivated land of which was not acquired. The proprietor claimed value of acquired land and a sum 'for damage sustained by severance'. Neither in the statement of claim nor in the objections to the award did he claim for the value of the 'special adaptability' of the land acquired for supplying drinking water otherwise than to his own acquired lands. But before Court he argued a claim for that also.

Held, that this claim can be entertained if it is not inconsistent with his original claim. S. 53 of the Land Acquisition Act makes Civil Procedure Code applicable to all proceedings before the Court under the Land Acquisition Act where the Code is not inconsistent with the Act and therefore O. 14, r. 3, Civil Procedure Code, will apply and will enable the Court to consider in framing the issues not only the pleadings (*i.e.*, the statement of claim, the award and the objections thereto) but also the allegations of the pleaders where they are not inconsistent with the pleadings. The Court would therefore have jurisdiction to frame an issue which does not directly arise from the objections taken provided that it is not totally inconsistent with them and the Court could have given the claimant leave at the time of issues to amend his statement of objections. Though S. 18 (2) requires that the application for a reference to Court shall state the grounds on which the objection is taken, there is a sufficient compliance with the provisions of this sub-section if the application states on which of the four heads of objections detailed in sub-S. (1) the applicant proposes to rely. When an objection to the amount is taken, the Court has jurisdiction to work out the amount of the compensation in a manner different from that which has been adopted in the statement of objections. The Court has jurisdiction in a proper case to consider the effect of valuation on a different basis though no express objection was taken on this basis and no specific claim for compensation to this effect was urged before the acquisition officer.

23 L.W. 731 and L.R. 57 I.A. 100, distinguished.

59 M.L.J. 30, doubted.

In a case of compulsory acquisition the owner is only entitled to claim compensation based on the value of the land to himself and not based on its value to the acquiring authority. The value to be ascertained is the value to the seller of the property in its actual

condition at the time of ex-propriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired. There was here at the time of the notification no other purchaser besides the Harbour authority who was reasonably possible as a purchaser for the drinking water-supply on the land. That being so, this special adaptability has no value apart from the value created by the scheme for which it is acquired. What is called special adaptability of the land, *i.e.*, the natural suitability of the land for some special use other than the use to which it is put by the owner, is an element to be taken into consideration in assessing the value, and the compensation to be awarded for such special adaptability is its value based on prudent business calculations having reference to the position on the date of the notification. But where on that date there exists no person who can reasonably be presumed to be a probable buyer of the property for the special purpose to which it is adapted, then the special adaptability cannot be taken into consideration at all in assessing the compensation, for to take it into consideration in such circumstances would be to make the acquiring authority pay for its own improvements, would nullify the effect of the statutory power of compulsory purchase, and would involve the consideration of the urgency which has led to the acquisition.

Page (*of Calcutta Bar*) instructed by *The Government Solicitor* for Appellant.

The Advocate-General (*Sir A. Krishnaswami Aiyar*), *K. Umamaheswaran* and *P. Venkataramanayya* for Respondent.

S.V.V.

Varadachariar and Pandrang Row, JJ. Appeal No. 218 of 1934.
5th May, 1937.

Nattukottai Chetties—Custom—Agency—First agency—Agent continuing for another agency—Handing over of accounts to principal—If rendering of accounts—Suit for specific charges in accounts—If Art. 89 or Art. 90 governs the case—If the two agencies to be treated as separate.

The plaintiff had a cloth shop in Kumbakonam and he was also doing some money-lending business there. The defendant became his agent at Kumbakonam under a salary chit (Ex. A) dated 28th April, 1919. As usual it was for a period of three years and provided that the defendant should receive a salary of Rs. 50 a month. On 18th May, however, the plaintiff gave a letter (Ex. I) to the effect that, in addition to the salary, the defendant was to be paid 5 per cent. of the profits after deducting 'interest charge' and other charges. To facilitate the conduct of

business a power of attorney (Ex. B) was executed by plaintiff in favour of the defendant on 12th November, 1920, but this was not in terms limited to any specified period. On 24th August, 1922, a new salary chit (Ex. C) was executed under which the defendant was to be paid a salary of Rs. 90 a month and 7 per cent. share of the profits both to take effect from 13th April, 1922. The defendant continued in the business of agency up to 29th January, 1925. The account books were handed over to plaintiff. The plaintiff brought this suit on 23rd January, 1928, to direct the defendant to render proper accounts. It was contended that the suit was barred under Art. 90 and that even if Art. 89 applied, the agencies under Ex. A and Ex. C cannot be treated as distinct agencies and the suit must be held to be barred at least as regards (Ex. A) agency.

Held, that though by reason of the plaintiff being in possession of accounts, the plaintiff had not to pray for a general accounting, it was a suit for account. The mere fact that the plaint also contained allegations that in certain transactions the defendant had acted in excess of his authority will not make the suit any the less one governed by Art. 89. I.L.R. 41 Mad. 1, followed.

The principal purpose of the salary chit is to fix the remuneration of the agent; whether on the termination of the period fixed in the salary chit the agency also terminated or not is a question of fact and not a question of law. There was here no justification for treating this as two separate agencies for this purpose. 31 M.L.J. 685, relied on.

The plaintiff had invested some money as capital in the business. He claimed that before the 5 per cent. under Ex. A or 7 per cent. under Ex. I is ascertained, interest at a reasonable rate on the sums invested should be deducted.

Held, the ordinary rule is that as between partners or between the principal and an agent who is paid for his services by a share of the profits of the business, interest on capital is not to be charged in taking accounts unless there is some agreement to that effect; and in construing an agreement between partners, this rule will have to be kept in view so that unless the agreement has clearly indicated a different arrangement, the partner will not be entitled to interest.

When an agent of a Nattukottai Chetti firm leaves the business, the principal has no alternative but to accept all the outstandings as they stood at the time the agent left the business. The mere fact of the entries having been carried into the new books does not justify the inference that all the outstandings were

accepted by the plaintiff as good assets. But where particular outstandings arising out of credit transactions were really realisable assets on the date when the defendant left the business, the mere fact that by reason of subsequent events, that is either on account of change in the situation of the debtors or because of laches or negligence on the part of the plaintiff or his later agents in making the collections, some of these outstandings have not been realised, they should not be deducted to the prejudice of the agent in calculating profits to determine the share thereof payable to the agent.

K. V. Krishnaswami Aiyar and *R. Ramasubba Aiyar* for Appellant.

T. M. Krishnaswami Aiyar and *T. S. Krishnamurthi Aiyar* for Respondent.

S.V.V.

Venkataramana Rao, J. S. A. No. 702 of 1933.
5th May, 1937.

Minor—Decree by consent—Court not apprised of all facts known to one of the parties—If can set aside the decree.

A decree suffered by a next friend or guardian *ad litem* of the minors in a suit can be set aside on their attaining majority on the ground of fraud, collusion or gross negligence of the next friend or guardian. What is gross negligence will depend on the facts of each case, but it must be such negligence as would lead to the loss of a right which must have been successfully asserted if the suit had been conducted or resisted with due care (6 C.L.J. 448). The omission to prosecute a claim (3 W.R. 46), to set up a valid plea (27 M.L.J. 486), to offer evidence to support a plea (67 M.L.J. 927) have been held in certain circumstances to amount to gross negligence as would warrant giving relief to a minor by setting aside the decree. A decree by consent would stand on the same footing as other decrees (28 Bom.L.R. 362 and A.I.R. 1929 Mad. 96, distinguished), though it may be a consent decree obtained with the sanction of Court cannot be set aside except upon very strong grounds (46 E.R. 419).

An obligation is cast on both the parties to place all the materials in their possession before Court where minors are concerned in order to enable the Court to judge the fairness of the compromise. There must be a compromise of doubtful claims and there must be equal knowledge on both sides. Where a party seeking the benefit of a compromise against a minor had no honest belief in the claim he was making and the claim was absolutely without any foundation, the compromise would not be allowed to stand. The reason is that the Court is not apprised of the real state

of facts and the compromise sanctioned by the Court must be deemed to have been passed on a misapprehension of material facts having been withheld by the party who had knowledge of the same. Such withholding would in law amount to fraud. Failure of a guardian to do his duty in getting all the available material and placing it before the Court would amount to gross negligence and stand on the same footing.

L.R. 18 Eq. 573, rel. on.

I.L.R. 45 Cal. 17 and I.L.R. 47 Mad. 181, ref.

A.I.R. 1929 Mad. 96, distinguished.

B. Jagannadha Das for Appellant.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Respondents.

S.V.V.

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Venkataramana Rao, J. S. R. No. 26683 of 1936.
6th May, 1937.

Court-Fees Act, Art. 17-A—Suit by a puisne mortgagee—Prior mortgagee added as defendant—No dispute about amount due to prior mortgagee—Court deciding against priority—Appeal by prior mortgagee—Court-fee payable.

In a suit to enforce a mortgage dated 7th August, 1920, executed in favour of plaintiff's assignor by the first defendant, the eleventh defendant was impleaded as a party to the suit on the ground that he was in possession of the suit properties as an assignee from a purchaser at a sale in execution of a mortgage decree obtained by one *N* in respect of a mortgage dated 7th August, 1915, executed by the third defendant in favour of *N's* father *V*. One of the defences of the eleventh defendant was that he was entitled to set up the mortgage of 1915 as a shield, being a mortgage prior in date to the mortgage sued on and that the priority claimed by him should be recognised. An issue was raised "whether the eleventh defendant is entitled to the priority claimed and is plaintiff obliged to redeem him." The lower Court denied the claim to priority and ordered that the sale proceeds should be first paid to plaintiff and out of the balance the eleventh defendant should be paid. As against that the eleventh defendant filed this appeal and paid a court-fee of Rs. 15 as for a declaration and the office objected that it was not sufficient.

Held, that the court-fee was proper. In cases where the amount is not disputed and where the liability of the mortgage property is also not disputed and the only question is who is entitled to be paid the sale proceeds, so far as the prior mortgagee, who is a defendant is concerned, the only relief that could be got by the pusine mortgagee in the suit brought by him will be a

declaratory one. In this case the order for sale has been passed at the instance of a puisne mortgagee. The other directions necessarily follow from this order for sale by reason of the prior mortgagee being made a party to the suit. There has already been an order for sale; there has already been a declaration of liability of the suit property in respect of the mortgage set up by the 11th defendant. The only question is whether he is entitled to any priority. All that he is seeking in appeal is to get rid of the declaration made against him and to have a declaration in his favour. Therefore a declaration is enough.

I.L.R. 61 Cal. 320, relied on.

I.L.R. 54 All. 647, not followed.

48 L J. 323 and 16 A.L.J. 81, distinguished.

K. V. Ramachandra Aiyar for Appellant.

K. S. Champakesa Aiyangar for *The Government Pleader* for Government.

S.V.V.

Varadachariar and Pandrang Row, JJ. Appeal No. 223 of 1934.
6th May, 1937.

Appeal—Hindu Law—Suit for maintenance — Coparcener becoming insolvent pending suit—Official Receiver added as defendant—Insolvent also on record—Decree therein—Appeal by insolvent alone—Official Receiver impleaded as respondent—Appeal if maintainable—Provincial Insolvency Act, S. 59—Civil Procedure Code, O. 21, rr. 8 and 10.

The plaintiff, the widowed daughter-in-law of the 1st defendant, brought a suit for maintenance, past and future. During the pendency of the suit in the trial Court, the 1st defendant was adjudicated an insolvent on the application of a creditor. On adjudication the Official Receiver was added as 2nd defendant. It was objected that after addition of the Official Receiver, the 1st defendant cannot continue the defence. But the Court overruled it and he was permitted to continue. The Official Receiver did not appear to have taken any part in the conduct of the defence when the decree was passed in the lower court. The 1st defendant therefore filed this appeal impleading the Official Receiver as a party respondent.

Held, that the appeal is maintainable. The 1st defendant is *eo nomine* a party and as such he is entitled to appeal in the absence of any specific provision disentitling him from appealing. It cannot be said that the claim in the suit is one which merely related to the property of the insolvent. 'Relating to property' in S. 59 (*d*) of the Provincial Insolvency Act should not be treated

as synonymous with "affecting the property". It is no doubt only by reason of the possession of the coparcenary property that the 1st defendant will be liable to the plaintiff. But so far at any rate as arrears are concerned, the plaintiff complains that the 1st defendant has been in possession of property from her husband's death to date of suit and has withheld maintenance and therefore this liability is a personal liability of the 1st defendant. The mere fact that the plaintiff will also be entitled to ask that it should be charged on the property will not show that the liability is not personal but only shows that the plaintiffs' right is twofold and cumulative. Even as regards the future liability, it is no doubt limited by the possession of the property and the extent of property but as long as he is in possession of assets, his liability will continue to be personal to the limit of the property. O. 21, rr. 8 and 10 do not deprive him of this right of appeal.

I.L.R. 36 Bom. 568, not approved.

13 L.W. 616 and 65 M.L.J. 719, relied on.

Prima facie the charge must be on the husband's share in joint family property, although in exceptional circumstances a court may declare a charge on a larger extent of the joint family property.

M. S. Ramachandra Rao for Appellant.

A. Lakshmayya for Respondent.

S.V.V.

[END OF VOL. I.]

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NOTES OF INDIAN CASES.

Deena Bandhu Gan *v.* Makim Sardar, (1935) I.L.R. 63 Cal. 763.

This decision raises the question of a tenant's right to dispute the title of his landlord if the latter is only a benamidar; and we submit, if we may say so with respect, that the learned Judge has laid down the law correctly though the effect of the prior decisions is far from clear. The learned Judge has held that even if it is only the benamidar who let the tenant into possession, the latter is estopped from disputing his title and showing that the real owner is some one else. The material circumstance is as to who inducted the tenant into possession and not in whose favour the lease deed is executed.

In this connection, it must be observed that in the English text books, the rule of estoppel against the tenant disputing the title of his landlord has been dealt with as a species of estoppel *in pais* and not under the head of estoppel by deed. The rule in England which has been followed in this country under S. 116 of the Indian Evidence Act, is based on the tenant taking possession under the person who inducted him into it. That it is not an estoppel by deed is clear from the fact that even in cases where the tenancy has not been created by deed it has been held to apply. (*Phipps* v. *Sculthorpe*[1] and *Doe* v. *Wilkinson*[2].) The rule of estoppel against the tenant has gone to the length that when a person representing himself as the agent of two persons lets a tenant in possession, the latter cannot show in a suit by the person who so let him into possession that he was not the agent of those principals. *Fleming* v. *Gooding*[3].

1. (1817) 1 B. and Ald. 50: 106 E. R. 19.
2. (1824) 3 B. and C. 413: 107 E.R. 787.
3. (1834) 10 Bing. 549; 131 E.R. 1008.

It is thus clear that if a benamidar let a tenant into possession, the latter cannot set up the benami character of the former's title. This is what the learned Judge has pointed out in this case. It must be admitted that this aspect of the matter has not been kept clearly in view in *Kuppu Konan* v. *Thirugnanasambandam Pillai*[1], a decision which further proceeds on the older Madras view that a benamidar cannot bring a suit which is no longer the law after the Privy Council decision in *Guru Narayan* v. *Sheolal Singh*[2]. The later decision in *Muthuswami Aiyar* v. *Solai Konan*[3], simply follows the case in *Kuppu Konan* v. *Thirugnanasambandam Pillai*[1]. As regards the old decision in *B. Donzelle* v. *Baboo Kedarnath Chuckerbutty*[4] we are not sure whether the learned Judges did not try to rest the rule of estoppel against tenant disputing his landlord's title as a species of estoppel by deed which they say is inapplicable to this country. The view of the learned Judges in that case would seem to be that the English rule of estoppel against tenant would not apply to this country. This is how the learned authors of the well-known commentary on the Indian Evidence Act Mr. Ameer Ali and Sir John Woodroffe have understood that decision at page 904 of the 9th edition of their work. There is no doubt that when the case came up at a later stage in *Kedarnath Chuckerbutty* v. *Benjamin Donzelle*[5], Mr. Justice Phear stated the principle correctly in his judgment. Whatever may be the effect of these older decisions, the case under notice places the matter on the only correct and intelligible legal footing.

PONNAMBALA DESIKAR *v.* PERIYANAN CHETTY, (1936) 71 M.L.J. 105: L.R. 63 I.A. 261: I.L.R. 59 Mad. 809 (P.C.).

Since *Vidya Varuthi's case*[6] many attempts have been made to restrict the operation of that case. In some cases it was sought to restrict it to leases; in some to mutts or other institutions where the head has a beneficial interest and to exclude temples where the trustee has no interest; in others, again, the position was taken that there was a conflict between that judgment and other judgments of the Privy Council, *e.g.*,

1. (1908) I.L.R. 31 Mad. 461.
2. (1918) I.L R. 46 Cal. 566.
3. (1914) 26 M.L.J. 597.
4. (1871) 7 B.L.R. 720: 16 W.R. 186.
5. (1873) 20 W.R. 352.
6. (1921) 41 M.L.J. 346: L.R. 48 I.A. 302: I.L.R. 44 Mad. 831 (P.C.).

Gnanasambanda v. *Velu Pandaram*[1], *Damodar Das* v. *Lakhan Das*[2] and that the conclusion in those judgments was preferable and it was thought that support was to be found for that view in *Subbayya Pandaram* v. *Muhammad Mustapha Maracayar*[3]. In *Mahanth Ram Charan Das* v. *Naurangi Lal*[4] their Lordships held that the distinction between leases and other kinds of alienations was unjustified. In that case, their Lordships resolved the apparent conflict between the judgments of the Privy Council by pointing out that in those other cases the alienation was of the office itself and not of an item of property to which different considerations would apply. In this case, their Lordships finally hold that there is no justification for the view that there is a difference between mutts, temples or family endowments. In all cases equally the rule laid down in *Vidya Varuthi Thirtha* v. *Balusami Aiyar*[5] applies. So that during the lifetime of the grantor the alienation would be voidable and limitation would not run; so also in the case of his successors who might be presumed to know of the circumstances of the grant and its invalidity and can, therefore, be presumed only to continue the tenure for their lives. But as time goes on the question whether the alienation (in this case it was a lease) was originally justified becomes less easy to answer and after a time, even if the manager knows of the absence of necessity of the lease, it might become necessary to consider whether he also knows of and can be taken to rely upon the presumption which imputes such knowledge to all of his predecessors and then the question to be decided becomes as formulated by their Lordships whether the manager knowing of the infirmity of the alienation, accepted the rent as payable in respect of certain tenancy which it was in his power to create for the period of his own managership or to create for a shorter period and to continue from time to time or whether on the other hand it is that he accepted it as payable in respect of a permanent right which it was no longer in the power of his temple to repudiate. On the facts of this case their Lordships held that the latter was the right inference and so held that adverse possession ran during the period of the management of Nataraja who was a

1. (1899) 10 M.L.J. 29: L.R. 27 I.A. 69: I.L.R 23 Mad. 271 (P.C.).
2. (1910) 20 M.L.J. 624: L.R. 37 I.A. 147: I.L.R. 37 Cal. 885 (P.C.).
3. (1923) 45 M.L.J. 588: L.R. 50 I.A. 295: I.L.R. 46 Mad. 751 (P.C.).
4. (1933) 64 M.L.J. 505: L.R. 60 I.A. 124: I.L.R. 12 Pat. 251 (P.C.).
5. (1921) 41 M.L.J. 346; L.R. 48 I.A. 302: I.L.R. 44 Mad. 831 (P.C.).

remote successor of the alienor. On the judgment of their Lordships three positions are possible: (*i*) the successors might know of the invalidity or may be so placed in point of time as to be presumed to know and the presumption will be that they simply continued or if they recognised the permanent tenure, it would be tantamount to the grant of a new permanent tenure and attract the same consequences as the original grant; (*ii*) the successors may not be aware of the circumstances and acquiesce in the original grant in which case, adverse possession would commence; and (*iii*) the successor may be aware and yet consider it not possible to repudiate and so acquiesce in which case also, the possession of the tenant would be adverse.

These principles would *mutatis mutandis* apply to sales and other alienations but in their application might present great difficulties. The only consoling feature is that the legislature has made the rule more definite and these discussions will soon become out of date.

The observations of the Privy Council in *Mahanth Ram Charan Das* v. *Naurangi Lal*[1], *Vidya Varuthi Thirtha* v. *Balusami Aiyar*[2] and *Subbayya Pandaram* v. *Muhammad Mustapha Maracayar*[3], would seem to be taken in some cases as upholding the alienations for the life of the grantor even if he should be disposed to question them. From the discussion in this case, it would seem to be clear that all that their Lordships mean is that the alienation is not void altogether but only voidable and as such there is no adverse possession during the lifetime of the people at whose option it is voidable and not that they are good for his lifetime absolutely. Such alienations can certainly be avoided by persons interested like worshippers or disciples and they can be avoided even by the alienating manager himself for it is difficult, as their Lordships point out in this case to justify the barring of suit on the ground of personal estoppel when it is all round recognised that the property vests in the deity or institution and not in the head or manager. That is the view taken in a series of cases in Madras. (See *Yasim Sahib* v. *Ekambara Aiyar*[4].)

1. (1933) 64 M.L.J. 505: L.R. 60 I.A. 124: I.L.R. 12 Pat. 251 (P.C.).
2. (1921) 41 M.L.J. 346: L.R. 48 I.A. 302: I.L.R. 44 Mad. 831 (P.C.).
3. (1923) 45 M L.J. 588: L.R. 50 I.A. 295: I.L.R. 46 Mad. 751 (P.C.).
4. (1919) 37 M.L.J. 698.

JOGENDRA CHANDRA BANERJI *v.* SHACHEENDRA KUMAR SHEAL, (1935) I.L.R. 63 Cal. 813.

One of the questions in this case was whether a promissory note which is not properly stamped can be used as an acknowledgment of a prior loan referred to in it and the learned Judge has answered it in the negative relying on the wide language of S. 35 of the Indian Stamp Act of 1899. In coming to this conclusion, the learned Judge has differed from two decisions of the Madras High Court in *Gopala Padayachi* v. *Rajagopal Naidu*[1] and *V. R. Rakkappan Ambalam* v. *C. Suppiah Ambalam*[2] and the decision of the Allahabad High Court in *Randhir Singh* v. *L. Thaman Lal*[3]. There is also a later decision of the Madras High Court to a similar effect in *Vencheswara Sastri* v. *Narayana Aiyar*[4]. These decisions proceed on the view that an unstamped document which is required by law to be stamped can be used in evidence for a collateral purpose. It is difficult to justify these cases having regard to the wide terms of S. 35 of the Act which in this respect are the same as those of S. 14, sub-S. (4) of the English Stamp Act of 1891. It has been held in *Fengl* v. *Fengl*[5] that under the English section there is no justification for holding that an unstamped document can be used in evidence for a collateral purpose. Even in Madras, the latest view is, as laid down in 67 M.L.J. (Notes of Recent Cases) p. 37, that an unstamped promissory note cannot be used in evidence to prove an acknowledgment of the debt differing from *Rakkappan Ambalam* v. *Suppiah Ambalam*[2] and *Vencheswara Sastri* v. *Narayana Aiyar*[4]. Reference may also be made to a later decision of the Patna High Court in *Tribhuan Ojha* v. *Ramchandra Dube*[6]. The subject will be found fully discussed with reference to all the English and Indian cases in an article in 68 M.L.J. (Journal) p. 37.

SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* LOVNA COLLIERY COMPANY, LTD., (1935) I.L.R. 15 Pat. 510.

Suits for recovery of compensation amounts statutorily payable on account of acts done by Government do not come

1. A.I.R. 1926 Mad. 1148.
2. A.I.R. 1930 Mad 485: 32 L.W. 691.
3. A.I.R. 1934 All. 951.
4. (1932) 36 L.W. 918.
5. (1914) Probate 274.
6. (1934) I.L.R. 14 Pat. 233: A.I.R. 1935 Pat. 375.

under Art. 2. They are governed either by Art. 18 or Art. 120. Where the plaintiff's complaint is not that the Government's action in acquiring his property is wrong but only that the statutory compensation payable is being withheld from him, he is not claiming compensation by way of damages for an illegal or tortious act and such cases are not within the scope of Art. 2 of the Limitation Act. Claims for monies due under a statutory liability will ordinarily come under Art. 120 only.

BRAJNANDAN SINGH *v.* RAMNATH MALI, (1935) I.L.R. 15 Pat. 561 (F.B.).

Institution of deliberately false suits by plaintiff against defendants who are residing at places far away from the particular Courts, is not perhaps infrequent. The legislature added a new S. 35-A to the Civil Procedure Code providing for compensatory costs in some cases. There would appear to have been also certain administrative circulars which provide for the District officer procuring the services of the Local Government pleader on behalf of such defendants after he has satisfied himself through the agency of the Criminal Intelligence Department that there are valid grounds for believing that the claim is deliberately false and oppressive. The proceedings in this case disclose that the practice has been apparently for the Criminal Intelligence Department Officials to write to the presiding officer of the Court that the matter is being investigated and asking for postponement of the trial pending enquiry. At any rate that is what happened in this case. Their Lordships had no hesitation in condemning such procedure as totally unwarranted and animadverted on the same as a serious interference with the course of justice. Their Lordships further observe that such communications from third parties, however laudable the motive, should never form part of the record and under no circumstances should action be taken upon such communications unless and until the Court had drawn to them the attention of the party who might be adversely affected and has heard such party ordinarily in open Court.

It may be noted that, with reference to the receipt of an anonymous letter by a judge relating to a case pending before him, the Privy Council observed in *Srinivas Prasad Singh* v. *Keshava Prasad Singh*[1], that the proper thing to do is to

1. (1935) 70 M.L.J. 94: L.R. 63 I.A. 12: I.L.R. 63 Cal. 662 (P.C.).

destroy the letter and that if however the letter should have been kept in the record, the parties should at once have been informed of its existence.

NRISINGHA CHARAN NANDY CHOUDHRY *v.* RAJNITI PRASAD SINGH, (1936) 71 M.L.J. 60: L.R. 63 I.A. 311: I.L.R. 15 Pat. 567 (P.C.).

This decision is noteworthy in so far as their Lordships repel the contention that the word 'trial' in the provision of the act to the effect that the 'trial' of suits in certain Courts should be regulated by the ordinary Civil Procedure, should be construed as not including jurisdiction to take cognisance of the suit. The judgment holds that the provision that the 'trial' of suits is to be regulated by the Code includes all essential matters governing the hearing of a cause *including the preliminary matter of the competence of the Court to entertain it.* The rules of the Code relating not only to procedure but also those governing jurisdiction are equally applicable. So construed, the sections of the Civil Procedure relating to jurisdiction, Ss. 16 to 22 are applicable to the Civil Courts in the Sonthal Parganas area and it follows that a suit by a mortgagee for sale of the hypotheca can be instituted in any of the Courts where portion of the subject matter was situated.

The decision in *Rajah Setrucharla Ramabhadra Raju* v. *Maharajah of Jeypore*[1] is therefore distinguishable inasmuch as both the Courts are governed by the Civil Procedure here and the choice is only between them and S. 17 of the Civil Procedure Code will therefore be applicable.

MAHARAJA KUMAR RAM RANBIJAYA PRASAD SINGH *v.* DEOKI AHIR, (1936) I.L.R. 15 Pat. 619.

The distinction between retrospective operation of an Act and its scope in interfering with existing rights though arising out of transactions prior to the Act coming into force is illustrated in this decision. The relevant provisions of the Act conferred on every tenant in possession of certain lands at the time of the commencement of the Act, certain occupancy rights and provided against his being ejected for a definite period. It

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1. (1919) 37 M.L.J. 11: L.R. 46 I.A. 151: I.L.R. 42 Mad. 813 (P.C.).

was argued that persons who had been inducted into possession under tenancies before the Act came into force were liable to be ejected on the expiry of the period of their existing tenancies, and could not take advantage of the statutory protection. Their Lordships reject this argument and hold that all tenants in possession are included within the scope and ambit of the section and words limiting the benefit conferred and excluding tenants under leases granted prior to the commencement of the Act cannot be imported into the clear language of the statute. The question is not whether the Act was retrospective but only whether on a proper construction of the language as it stands the existing rights of the landlord to recover possession in future are affected or not. Tenancy legislation often confers a right of occupancy and takes away the right of the landlord to eject the tenant. An instance of a similar right can be seen in S. 6 of the Madras Estates Land Act and a Full Bench of the Madras High Court in *Kanakayya* v. *Janardhana Padhi*[1], construed the section as conferring a right of permanent and heritable occupancy even as regards tenants who were in actual possession on the relevant date though the landlord had actually obtained a decree in ejectment against them but had not by that time taken possession of the land under the decree.

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1. (1910) 21 M.L.J. 31 : I.L.R. 37 Mad. 1 (F.B.).

JOTI LAL SAH *v.* SHEODHAYAN PRASAD SAH, (1936) I.L.R. 15 Pat. 607.

A second suit for redemption is not barred merely because of the decree in a previous suit for redemption obtained by the same plaintiff, notwithstanding that he did not pay the amount and actually redeem the mortgage. The conflict on this question must be taken as settled by the decision of the Privy Council in *Bhaiya Raghunath Singh* v. *Hansraj Kunwar*[1] to which however no reference is made in the judgment under notice. The earlier Full Bench decision to the contrary of the Madras High Court in *Vedapuratti* v. *Vallabha Valia Raja*[2] has been overruled by the recent decision of a Full Bench of the Court in *Viroopakshan Nambudripad* v. *Chembu Nayar*[3]. Unless therefore the statutory right of redemption given by S. 60 of the Transfer of Property Act is extinguished by means and in manner enacted for that purpose by the Act and the Civil Procedure Code, the mortgagor can exercise it and a suit for redemption will lie accordingly.

BYRAMJI BOMANJI TALATI *v.* THE OFFICIAL ASSIGNEE OF BOMBAY, (1935) I.L.R. 60 Bom. 444.

" The Statute of Limitations has nothing to do with the bankruptcy laws. When bankruptcy ensues there is an end to the operation of the statute with reference to debtor and creditor."—Per *Bacon, V.C.*, in Ex parte *Lancaster Banking Corporation*[4]. It is well settled that the debts which are barred by limitation are not provable in insolvency. The question is what is the material date when the debt must be alive, to be capable of proof. Is it the date of the petition for adjudication or the date of the order of adjudication under the Provincial Insolvency Act? Is it sufficient if a debt is not barred at the date of the act of bankruptcy under the Presidency Towns Insolvency Act? These questions have been recently considered by some of the High Courts, there being no direct older authorities under the Indian decisions. In *Nizam* v. *Babu Ram*[5] the Lahore High Court held that a debt not barred on the date of the petition under Act V of 1920, should be admitted to proof

1. (1934) 67 M.L.J. 813: L.R. 61 I.A. 362: I.L.R. 56 All. 561 (P.C.).
2. (1902) 12 M.L.J. 128: I.L.R. 25 Mad. 300 (F.B.).
3. (1937) 1 M.L.J. 83 (F.B.).
4. (1878-79) L.R. 10 Ch. D. 776.
5. (1933) I.L.R. 14 Lah. 730.

though it was barred on the date of the adjudication order. Reliance was placed on the well-known provision of 'relation back' under S. 28, cl. (7). The decision under notice holds, with reference to the Presidency Towns Insolvency Act, that it is enough if the debt was not barred at the commencement of the bankruptcy, that is on the date of the earliest act of bankruptcy. The Madras High Court had recently to consider the matter in C.R.P. No. 1097 of 1935[1] and in an exhaustive judgment their Lordships ultimately agree with the Lahore view though several considerations are pointed out which may well justify a different conclusion. The true principle must be that the running of limitation is stopped when a trust is created statutorily, for the benefit of the creditors and that must be taken to be the crucial date. There is nothing to prevent a creditor from suing a debtor till the date of the order of adjudication. The English Act has now by its rules fixed the date of the receivership order as the date on which the debt must be subsisting for being admitted to proof. The Indian systems of bankruptcy differ from the English system in several particulars and the Acts themselves are by no means so clear or comprehensive as they ought to be. On a matter like this the Legislature should leave no room for any doubt. The insolvency laws need a revision and a committee to deal with the same cannot be formed too soon.

MAHABIR PRASAD *v.* BRIJ MOHAN PRASAD, (1936) I.L.R. 15 Pat. 637.

The short and cryptic decision of the Judicial Committee in *Annapurnabai* v. *Ruprao*[2] which has been misunderstood as giving a wide scope for purposes of appeal to the Privy Council under Ss. 109 and 110, has been in more recent decisions of the various High Courts confined to its facts and narrowed down in its operation. The Calcutta High Court has in *Bibhootibhooshan Datta* v. *Sreepati Datta*[3] considered the question fully. The Madras High Court has recently followed the said decision and has dealt with the exact scope and effect of the Privy Council decision. (See *Venkitaswami Chettiar* v. *Sekkutti*

1. (1937) 1 M.L.J. (Short Notes) 16.
2. (1924) L.R. 51 I.A. 319: I.L.R. 51 Cal. 969 (P.C.).
3. (1934) I.L.R. 62 Cal. 257.

Pillai[1].) The decision under notice also takes a similar view and has negatived the right of further appeal where the petitioner has obtained on appeal a modification on one point and that completely in his favour, and has concurrently failed on other and different points. In such cases the decision is to be taken as an affirming one when an appeal is sought to be preferred with reference to such other points on which both Courts have agreed in their conclusion.

VITHAL THUKARAM KULKARNI *v.* BALU BAPU, (1936) I.L.R. 60 Bom. 671: 38 Bom.L.R. 520.

This decision is illustrative of the modern tendency towards equality of rights between the sexes and the leaning of Courts against any preference on the ground of sex alone. One may feel that this is against the spirit of the Hindu Law which ordinarily distinctly prefers the male claimant to the female claimant of an equal degree. The learned Judge however felt free to ignore the distinction as the matter before him was admittedly not governed by any definite text. In the particular case, a brother and sister have been held to be equally entitled to succeed as co-heirs to the stridhana property of their married sister. Her husband had predeceased her and there were no husband's sapindas to claim the property. Even in the case where the woman had been married in the approved form of marriage, her blood relations are entitled to succeed in the absence of her husband and his sapindas. The Crown cannot claim by escheat when the parents of the woman or their sapindas exist and can inherit. So much had been authoritatively settled by decisions of all the High Courts. But curiously enough, the relative order *inter se* amongst blood relations, in the absence of her parents had not been considered and decided before. Each of the claimants in the case claimed to succeed to the entire property as sole heir to the exclusion of the other. The learned Judge held that both were of the same degree of propinquity and sex being no disqualification according to the learned Judge, both succeeded as co-heirs. If it were a case of succession to the property of a male, undoubtedly the brother excludes the sister. Even for stridhanam succession in the case of an unmarried girl, the brother comes

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1. (1936) 71 M.L.J. 580.

before the sister by express texts. But the case under notice, was treated as not covered by any text or authority or valid analogical reasoning and on the ground of equity, the judgment was in favour of both. The decision relied on by the learned Judge however does not bear out the conclusion, as there was no competition between males and females of equal degree in the case cited and followed. The ultimate conclusion can be supported only on the ground that other things being equal, no distinction should be made between claimants of equal degree merely on the ground of sex. This is not perhaps in strict accord with the basic notions of Hindu lawyers but modern views of equity tend in that direction and that perhaps is the only safe foundation, for the conclusion arrived at. One need not regret the result though its soundness is not free from doubt.

CALICO PRINTERS' ASSOCIATION *v.* JEEVAN RAM GANGA RAM AND COMPANY, (1936) I.L.R. 63 Cal. 897.

The question that arose in this case was whether it was obligatory on the Court to order security for the costs in a suit where the defendant resides outside British India and is not possessed of any immovable property in British India. In England it has been held that a plaintiff residing abroad is bound to furnish security for the costs if he has no immovable properties in England, (*Ebrard* v. *Gassier*)[1] and the rule has been held to be an inflexible rule subject to certain well-recognised exceptions (*Crozat* v. *Brogden*[2].) It must be noticed that in England there is no statutory provision on the point, as we have here in O, 25, r. 1 of the Civil Procedure Code. It was argued in the case under notice that the word "may" in the rule should be read as having an obligatory force if the conditions of the rule are satisfied conformably to the English decisions; but the learned Judge has overruled the contention and held that it is only discretionary even though the conditions referred to in the rule are present. The point is concluded by authority in favour of the view taken by the learned Judge by the prior decisions of the Calcutta High Court in In the goods of *Premchand Moonshee*[3] and *Degumbari Debi* v. *Aushootosh Banerjee*[4] which have not been referred to by him. That the power under O. 25, r. 1, to order security for costs is only discretionary will further appear clearly when we compare it with the terms of the proviso to O. 41, r. 10 which enacts that it is obligatory on the Court to demand security in appeals where the appellant is residing out of British India and is not possessed of sufficient immovable property within British India. We are however not clear that the reluctance of Fry, L.J., in *Ebrard* v. *Gassier*[1] noticed by the learned Judge in this case was with reference to the obligation to furnish security rather than his adherence to the view held in *Redondo* v. *Chaytor*[5].

PAN MAL LODHA *v.* GAD MAL LODHA, (1936) I.L.R. 63 Cal. 1153.

The question in this case is one of considerable interest to social reformers and arose under the Child Marriage Restraint

1. (1884) 28 Ch. D. 232.
2. (1894) 2 Q.B. 30.
3. (1894) I.L.R. 21 Cal. 832.
4. (1890) I.L.R. 17 Cal. 610.
5. (1879) 4 Q.B.D. 453.

Act of 1929, commonly known as the Sarda Act. In a suit for partition, a receiver was appointed and an application was made to the Court for a direction to the receiver to pay a sum of money for the marriage of a girl in the family. The girl was over fourteen years of age. The marriage was fixed up with a boy of less than eighteen and the question was whether under the circumstances the Court could sanction any amount from the estate in the hands of the receiver for such a marriage. The Court answered it in the negative.

Though the point is one in which persons holding conservative and advanced social opinions may hold contrary views, in a Court of law, such considerations have no value and the question has to be decided according to law. In the first place, it must be noticed that the marriage of a girl in a joint family is a necessary samskara for which joint family funds can be legitimately utilised (*Lalla Gunpat Lal* v. *Mussamat Tooran Koonwar*[1] and *Subbayya* v. *Ananta Ramayya*[2].). If so, it is doubtful if money is spent or property is alienated to meet the expenses of a marriage of a girl to a boy of less than eighteen, the expenditure would be improper or the alienation bad, though it may render the persons who solemnised the marriage and the parents of the couple, etc., liable to prosecution. The offence is one created by the statute and unless the marriage is rendered invalid by the statute it seems difficult to say that the expenditure or alienation would be unlawful. Whatever may be the case if the marriage were to be celebrated in British India, the parties in the case wanted the marriage to be solemnised outside where the Act has no force, though the parties may be ordinarily resident in British India. That in such a case no offence under the Act has been committed was held by the Bombay High Court in *Narayan* v. *Emperor*[3]. A contrary view has been taken by a single judge of the Madras High Court in *Sreeramamurty* v. *Ranganayakulu*[4]. We are not sure that the decision of the Bombay High Court was referred to before the learned Judge in the Madras case. None of the points made by Sir John Beaumont, C.J., which led the Bombay High Court to come to that conclusion has been referred to or dealt with in it and this detracts considerably

1. (1871) 16 W.R. 52.
2. (1928) I.L.R. 53 Mad. 84 (F.B.).
3. (1935) I.L.R. 59 Bom. 745: A.I.R. 1935 Bom. 437.
4. (1937) 1 M.L.J. 388.

from the weight of the Madras case, which does not appear to have been fully argued on this question. It is unnecessary to stretch the provisions of a penal enactment beyond their apparent tenor and it seems with all deference, too much to rely, as the learned Judge in this case has done, on the preamble of the Act for the conclusion that such an expenditure like the one in question is improper. It is well known that the preamble to a statute is no guide to the construction of the enactment when there is no ambiguity in its provisions and the preamble itself is no part of the enactment (*Brindabun Chunder Sircar Chowdhry* v. *Brindabun Chunder Dey Chowdhry*[1] and *Collector of Trichinopoly* v. *Lekkamani*[2].).

CHHATRA PAT SINGH *v.* KHARAJ RAM LACHHMI RAM, (1936) I.L.R. 63 Cal. 1210.

In this case a single Judge of the Calcutta High Court has held that where a decree passed against a number of judgment-debtors is transferred to another Court for execution because one of the judgment-debtors has not property within the jurisdiction of the Court which passed the decree sufficient to satisfy it, the decree-holder cannot execute the decree in the transferee Court against any other judgment-debtor. No authority has been referred to in support of the proposition and reliance has been placed by the learned Judge only on the language of S. 39 of the Civil Procedure Code. It is difficult to support the conclusion on the language of the section, as all that it lays down is that the insufficiency of the property of a judgment-debtor to meet the decree is a ground for the transfer of the decree to another Court for execution. What the powers of the Court to which the decree is transferred are, in respect of execution, have to be gathered from S. 42 of the Civil Procedure Code, which lays down that the powers of the Court to which the decree is transferred are the same as those which it possesses as regards the decrees passed by itself. It cannot be doubted that if the decree had been originally passed by the transferee Court, it would have the power to execute it against all or any of the judgment-debtors. It is possible to say that it cannot execute the decree against any of the

1. (1874) L.R. 1 I.A. 178 at 190.
2. (1874) L.R. 1 I.A. 282 at 306.

judgment-debtors. We do not find any reference to this section in the judgment of the learned Judge. Again even the weight of authority seems to be against the view of the learned Judge. It is well recognised that a portion of a decree cannot be transferred for execution to another Court *Prakash Chandra* v. *Ramnarain*[1]. Nor can a decree be transferred for execution for a limited purpose to another Court *Chatter Pat Singh* v. *Kirat Chand Srimal*[2]. Reference may also be made to *Kusum Kamini* v. *Sailesh Chandra*[3] which is to a similar effect. It may also be noticed that once a decree has been transferred to another Court for execution, the original Court which passed the decree, except for the limited purposes mentioned in O. 21, rr. 16 and 22 and in the limited class of cases where simultaneous execution is ordered, is not a proper Court for executing the decree so long as the order of transfer is in force, *Maharajah of Bobbili* v. *Narasaraju Bahadur*[4]. These decisions seem to indicate that the decree is transferred in its entirety and it can execute the decree in any manner according to its tenor. For all these reasons, we venture to think that both the sections of the Civil Procedure Code and authority seem to be opposed to the view of the learned Judge in this case.

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1. (1917) 43 I.C. 186. 2. (1917) 39 I.C. 737.
3. A.I.R. 1935 Cal. 118: 38 C.W.N. 1053.
4. (1916) 31 M.L.J. 300: L.R. 43 I.A, 238: I.L.R. 39 Mad. 640 (P.C.).

SOMESHWARI PRASAD *v.* MAHESHWARI PRASAD, (1937) L.R. 63 I.A. 441 : I.L.R. 16 Pat. 1 (P.C.).

The holder of an impartible estate can incorporate other immovable properties belonging to him, as an accretion to that estate, where the estate is impartible by custom and not by a Crown grant. (*Shiba Prasad Singh* v. *Rani Prayag Kumari Debi*[1].) The crucial test of incorporation is the intention of the holder to incorporate which may be express or implied. Where the estate holder was an adjudged lunatic, their Lordships hold that properties purchased by the Court of Wards on his behalf could not be deemed to have been so incorporated, as no question of the intention of the owner could arise in such a case. It seems to follow that the same reasons will apply even in the case of a minor owner of an impartible estate, the guardian's intention in such cases being of no avail. In the particular case the purchase was of properties originally part of the impartible estate and granted by the estate as maintenance grants to a junior branch. Even such circumstances were held by their Lordships not sufficient to justify an inference of merger of the tenure with the reversionary right either on the ground of an actual or even presumed intention. Their Lordships say that the Court can presume an intention only where such a merger will be beneficial to the owner and in the particular case it would not be to the advantage of the holder that the purchased property which is *prima facie* self-acquired, should merge in the ancestral impartible estate as merger would not only deprive him of his unrestricted power of disposal over them but also operate as a gift to the eldest son and rob the junior members of the family of the right of inheritance under the ordinary law. Of the two reasons given, the first is not perhaps quite convincing as their Lordships seem to have ignored the undoubted and well-established right of the holder of an impartible estate to alienate the same at his pleasure, a right declared and given effect to as early as *Sartaj Kuari* v. *Deoraj Kuari*[2] and ever-afterwards affirmed in several decisions. The result of the incorporation is only to impress properties so incorporated with all the incidents which attach to the ancestral impartible estate itself. The second reason is nothing more than a mere statement that the rule of

1. (1932) 63 M.L.J. 196 : L.R. 59 I.A. 331 : I.L.R. 59 Cal. 1399 (P.C.).
2. (1888) L.R. 15 I.A. 51 : I.L.R. 10 All. 272 (P.C.).

primogeniture is an exceptional one and being contrary to the maxim of equity that 'equality is equity' should be established by strict proof.

DAROGA RAI *v.* BASDEO MAHTO, (1937) I.L.R. 16 Pat. 45.

Can a Hindu widow sell property of her husband for payment of a debt incurred by her for legal necessity and binding on the reversioners, when that debt has become time-barred. The Allahabad High Court would seem to have held in *Makkhanlal* v. *Musammat Sardar Kunwar*[1] that she could not. The present judgment holds that she can and we think rightly. It is well settled that she can pay her husband's time-barred debts. As regards her own debts properly incurred for necessity, even when the debt becomes barred, it should not be regarded as beyond her powers to sell the estate for payment of such debts. She can now acknowledge such debts so as to bind the reversion. (*See* Act I of 1927.) The test of "necessity or benefit" as usually stated is not to be taken as a kind of aphorism to be narrowly understood in the etymological sense of the words. The basic notions of Hindu law on the subject of debts should not be ignored. Hindu law itself recognises no law of limitation. A widow is in no sense a trustee for the reversion but is a full owner though with qualified powers of disposal. It is essentially a just and proper thing to pay up such debts though time-barred and a reversioner should not have a grievance in such cases.

BISHWANATH SAO *v.* THE OFFICIAL RECEIVER, (1937) I.L.R. 16 Pat. 60 (F.B.).

In commenting on *Nilkanta Narayan Tewari* v. *Debendra Nath Ray*[2] we ventured to point out that the soundness of the decision was open to considerable doubt and the decision should be reconsidered by a Full Bench (see *Nilkanta Narayan Tewari* v. *Debendra Nath Ray*[3].) The Patna Court has by its present Full Bench decision overruled the earlier case and has declared the law in the same terms as all the other High Courts had laid down. It may now be taken to be settled law that while

1. A.I.R. 1932 All. 555.

2. (1936) I.L.R. 15 Pat. 363. 3. (1936) 71 M.L.J. 23 (N.I.C.).

the sons' shares as such do not vest in the Official Receiver, the Hindu father's power to sell the shares of the sons also for non-Avyavaharika debts will vest in the Receiver and the Receiver can exercise the same wherever the father himself can do so. The law on this point is now the same both under the Presidency Towns Insolvency Act and the Provincial Insolvency Act.

GHANSHYAM DAS MARWARI *v.* RAGHO SAHU, (1937) I.L.R. 16 Pat. 74 (S.B.).

A Special Bench of five judges has held that a negotiable instrument can be transferred otherwise than by endorsement and delivery and that a promissory note can be assigned as a chose in action under S. 131 of the Transfer of Property Act. This point has long ago been taken as settled law by the other High Courts. (See *Muthar Sahib Maraicar* v. *Kadir Sahib Maraicar.*[1]) S. 137 of the Transfer of Property Act gives only an extended privilege to mercantile documents and is in no way restrictive. (*Venkatarama Aiyar* v. *Krishnaswami Chettiar*[2].) It was hardly necessary to constitute a Special Bench but apparently because of a reported decision in *Pearay Pasi* v. *Gauri Lall*[3] to the contrary appearing in the authorised Law Reports of the Province the Full Bench was constituted to reconsider it. The earlier decision is rightly overruled and all the High Courts are now agreed on this view.

RAMPARIKHA PANDEY *v.* MUSSAMMAT RAMJHARI KUER, (1936) I.L.R. 15 Pat. 753.

This decision points out the distinction between a suit for balance of unpaid purchase money based on a contract in the registered sale deed, promising to pay the same and a suit where it is based on failure to pay the same and on the statutory obligation to pay the agreed price. In the one case Art. 116 of the Limitation Act will apply and in the other case Art. 111 alone will apply. A recital that the consideration has been paid may be proved by evidence *aliunde* to be erroneous and a suit for recovery of the unpaid money will come under Art. 111

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1. (1905) 15 M.L.J. 384: I.L.R. 28 Mad. 544. 2. (1932) 35 L.W. 755, 3. (1934) I.L.R. 13 Pat. 655.

only; as the suit is in spite of the document and not under it. Art. 120 is excluded as there is a specific article dealing with such a case. The distinction is illustrated by the decision in *Raghubir Lal* v. *United Refineries, Ltd.*[1], where the suit was one based on breach of a contract in writing registered.

THAKUR SINGH *v.* RAMGULAM SINGH, (1936) I.L.R. 15 Pat. 762.

The soundness of this decision is open to doubt. So long as the mortgage in favour of the plaintiff was not and could not be set aside as a fraudulent preference the plaintiff was entitled to the right of a secured creditor. There was no estoppel by which he was precluded from disputing the rights of the Government whose prior mortgage was invalid for want of registration and who as a matter of fact never asserted or enforced any mortgage rights at all. In the circumstances there does not seem to have been any legal objection to the enforcement of the plaintiff's mortgage as a mortgage untrammelled by the superior rights of any other person. The mere recital in the plaintiff's document that there was a prior mortgage in favour of the Government is not sufficient to give any larger rights to the auction purchaser in the case.

[END OF VOL. I.]

1. (1933) 64 M.L.J. 655: L.R. 60 I.A. 183: I.L.R. 11 Rang. 186 (P.C.).